United States Court of Appeals

for the Second Circuit

APPENDIX

76-6076

United States Court of Appeals

For the Second Circuit

B

Docket No. 76-6076

W. J. USERY, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR,

Appellee,

against

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Appellant.

UNITED STATES COURT OF APPEALS
FILED
MAY 21 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX

Volume 5 — 1585a to 1906

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Plaintiff's Memorandum of Law in Support of Summary Judgment

MOTLEY, J. 1585a

U.S. DISTRICT COURT
FILED
DEC 17 1974
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Plaintiff,

- v -

INTERNATIONAL ORGANIZATION OF MASTERS MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendants.

72 Civ. 5031 (CBM)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,	:	
Plaintiff,	:	72 Civ. 5031 (CBM)
-v-	:	
INTERNATIONAL ORGANIZATION OF MASTERS MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This is an action brought by the Secretary of Labor of the United States Department of Labor pursuant to Section 402 of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §482. The complaint, filed on November 28, 1972, seeks to have the 1971 election of officers of the International Organization of Masters, Mates and Pilots ("IOMM&P") voided and to have the Court order a new election subject to the supervision of the Secretary of Labor.

In the complaint, the Secretary of Labor (hereinafter referred to as the "Secretary" or the "Department of Labor" or the "Government") alleged that the defendant union during the course of its 1971 election of officers had committed various violations of section 401 of the LMRDA, 29 U.S.C. §481, which therefore require that the election be overturned. Specifically the Government, in paragraph IX of the Complaint, alleged:

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"Defendant, in the conduct of the aforesaid election violated the following provisions of Title IV of the Act (29 U. S.C. 401):

(a) section 401(g) of the Act (29 U.S.C. 481(g)) in that union funds received by way of dues, assessment, or similar levy, were expended to promote the candidacy of certain persons in the election;

(b) section 401(e) of the Act (29 U.S.C. 481(e)) in that:

(i) members in good standing were denied the right to be candidates and hold office;

(ii) members in good standing were denied a reasonable opportunity for the nomination of candidates;

(iii) members in good standing were denied the right to vote for or otherwise support the candidate or candidates of their choice; and

(iv) defendant failed to conduct the election in accordance with its Constitution and By-Laws;

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(c) section 401(c) of the Act (29 U.S.C. 481(c)) in that:

(i) members were denied the right to inspect lists containing the names and last known addresses of all members of defendant;

(ii) defendant failed to comply with all reasonable requests of candidates to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy;

(iii) defendant failed to treat candidates equally with respect to the distribution of campaign literature; and

(iv) defendant discriminated against candidates with respect to the use of membership lists.

In its answer the defendant IOMM&P denied the Government's allegations of violations.

The Government now moves for summary judgment, pursuant to Rule 56, Fed. R. Civ. P., and Rule 9(g) of the General Rules for the Southern District of New York, declaring the 1971 election of defendant's officer's void and ordering a new election.

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Inasmuch as every violation alleged need not be proven in order to overturn the 1971 election, the Government now moves only with respect to selected violations covered in paragraphs IX(a), (b) and (c) of our complaint as set forth above. While we believe all the violations committed by the IOMM&P can be proved, there are no longer any material facts in controversy with respect to those few we will discuss infra that should prevent the Court from deciding this case as a matter of law. Accordingly, we make this motion and believe it will help avoid further, extensive, unnecessary discovery and a protracted, very lengthy trial.

Nature of the Government's Summary Judgment Motion

There were three pieces of literature which were prepared and distributed to the union members by the defendant IOMM&P at union expense, and with the use of union membership lists, for the benefit of Captain Thomas F. O'Callaghan, the incumbant International President, and his slate of candidates; such preparation and distribution violated 29 U.S.C. §§481(g) and 481(c). It need be shown that only one of these documents was in violation of section 481(g) or section 481(c) and that said violation "may have affected the outcome of the election" to necessitate the setting aside of the 1971 election. In POINT II, infra, the Government will

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concentrate on two of the three documents and demonstrate how each violated the proscriptions in section 481 in such manner as they "may have affected the outcome of the election".

While there are quite a few ways by which the defendant IOMM&P committed violations alleged in paragraphs IX(b) (i), (ii) and (iii) of the complaint -- all of which are subject to subsequent proof if need be -- this motion will deal with selected violations caused by a particular set of circumstances made operative by the provisions of the IOMM&P Constitution and of its Offshore Division's By-Laws themselves. As will be discussed in detail in POINT III, infra, two of the three Offshore Division Vice-Presidents, i.e. Vice-President (Atlantic) and Vice-President (Gulf), automatically ascended to their Vice-Presidential positions by a scheme which precluded many members in the Offshore Division's Atlantic area and Gulf area from participating in any respect in the selection of said two Vice-Presidents. Said members were denied, absolutely, any opportunity to nominate, support and/or vote for Vice-Presidential candidates for these positions or to run for these positions themselves. Necessarily these violations of section 481(e) rights "may have affected the outcome" of the election for these positions and accordingly new elections subject to the supervision of the Secretary must be ordered.

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In paragraph IX (b)(iv) the Government alleged that the IOMM&P failed to conduct the 1971 election in accordance with its Constitution and [Offshore Division] By-Laws. POINT IV, infra, will show how the defendant union disregarded said constitutional and By-Law provision 1) when denying certain members of one of the Offshore Division's locals (former Local 88) a certified list of members for campaign purposes and 2) by sending election ballots out to members well beyond the required 30 days following the close of the nominating period thus further violating 29 U.S.C. §481(e). These violations too, "may have affected the outcome" of the election and as separate violations mandate a new supervised election.

FACTS

The Union in 1971

The International Organization of Masters, Mates and Pilots ("IOMM&P") in 1971 was a national union consisting of approximately 10,500 ship deck officers, including ship captains and ship pilots, with officers in major ports throughtout the United States (¶¶ 1, 2 and 3, Rule 9(g) Statement)*. For the purposes of this action, it is a Labor organization as defined in 29 U.S.C. § 6402(i) thereby requiring it to adhere to the provisions

*Plaintiff's Statement Pursuant to Rule 9(g) annexed to the Notice of Motion shall be herein referred to as "Rule 9(g) Statement".

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of 29 U.S.C. §481. (¶¶ 4 and 5, Rule 9(g) Statement).

On October 1, 1970 a newly adopted Constitution became effective (¶7, Rule 9(g) Statement). This new Consitiution, which has been annexed to the Rule 9(g) Statement as Exhibit A, reorganized the IOMM&P into Divisions (See Article I, Section 2, IOMM&P Constitution*).

The Offshore Division is the largest division and is comprised of former offshore locals, now denominated as Ports. (¶9, Rule 9(g) Statement). The members of the Offshore Division are seagoing ships officers, sailing aboard Atlantic, Gulf and West Coast American Flag ocean going vessels (¶11, Rule 9(g) Statement). In 1971 there were approximately 8205 members of the Offshore Division (¶10, Rule 9(g) Statement). The Offshore Division By-Laws effective in 1971 are annexed to the Rule 9(g) Statement as Exhibit B. (¶¶ 12 and 21 Rule 9(g) Statement).

The Inland Division is composed of inland locals and consists of ships' officers assigned to vessels sailing in inland rivers, bays and sounds of the United States. (¶16, Rule 9(g) Statement). There were approximately

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*The Constitution of the IOMM&P shall be referred to herein as the "IOMM&P Constitution".

1500 members of the Inland Division in addition to approximately 600 from Inland Local 47, which local's association with the IOMM&P was in question and whose members did not vote for International officers. (¶¶ 16 and 17, Rule 9(g) Statement).

A third division, the Pilot Division consisted of approximately 550 members employed aboard American and foreign flag ocean going vessels as ships' pilots (¶18, Rule 9(g) Statement).

The elections the Government contests herein are those for the 1971 election of International Officers - an International President, an International Executive Vice-President and an International Secretary - Treasurer; and those with respect to the Offshore Division's officers and the officers of the Ports of the Offshore Division. The Pilots Division's elections are not contested; nor are the Inland Division's whose members only voted for International Officers during the subject 1971 election (Exh. F 1, Rule 9(g) Statement).

In 1971 the IOMM&P by referendum ballot voted to affiliate with the International Longshoreman's Association ("ILA") and became the International Maritime Division of the ILA (¶19, Rule 9(g) Statement). This referendum was conducted over a three month period from on or about August 20, 1971 to November 23, 1971 (¶ 131 and Exh. FF, Rule 9(g) Statement).

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The 1971 Election

The IOMM&P's 1971 election of officers was conducted pursuant to the provisions of the newly adopted International Constitution which became effective October 1, 1970. (¶¶ 7 and 20 Rule 9(g) Statement).

The elections for the Offshore Division and its Ports were conducted pursuant to the Offshore Division's by-laws, also effective October 1, 1970, as well as the International Constitution. (¶¶12 and 21 Rule 9(g) Statement). Certain provisions of both were applicable only to the 1971 election of officers and not to future elections. This period was considered the transition period.

According to Article V, Section 5 of the International Constitution, "Nominations for the offices of International President, International Executive Vice President and International Secretary-Treasurer shall be made at the Regular Convention preceding the election."

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At the 60th convention held in Galveston, Texas, July 26, 1971 to July 28, 1971, nominations were accepted for the International offices. (¶22 Rule 9(g) Statement). An International Ballot Committee comprised of five delegates was nominated and elected. (¶23 Rule 9(g) Statement)

Nominations for International officers ended July 28, 1971 (¶¶ 22 and 121 Rule 9(g) Statement).

International President O'Callaghan, International Executive Vice-President Caldwell and International Secretary-Treasurer Lowen were nominated for re-election to their respective offices. The challengers included Lloyd W. Sheldon and Robert Boyle Wright for International President; George Vance and Amos E. Koonce for International Vice-President; and Charles O. Norstrand and George H. Balser for International Secretary-Treasurer (¶¶ 39 and 40 Rule 9(g) Statement).

Nominations for offices of the Offshore and Pilots Division were conducted at the division level and not at the International Convention. (¶ 25, Rule 9(g) Statement).

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Article XIX Section 2(a) of the Offshore Division's By-Laws states that "all elective offices of the Offshore Division shall be open for nominations during the month of June, 1971. An election shall be held simultaneously with the election of International Officers". (See Offshore Division By-Laws- Exhibit B). Nominations for said Offshore Division offices were over no later than July 28, 1971 (¶¶ 122 and 123 Rule 9(g) Statement) and elections for all offices of the Offshore Division were conducted simultaneously with the election for International officers. (¶ 26, Rule 9(g) Statement).

A list of those individuals nominated for offices in the Offshore Division is included in Exhibit E annexed to the Rule 9(g) Statement. (See ¶41 Rule 9(g) Statement).

The American Arbitration Association ("AAA") was selected by the IOMM&P as the impartial balloting agency to conduct the election, pursuant to Article V, Section 3 of the IOMM&P Constitution and Article V, Section 3 of the Offshore Division By-Laws. The AAA in conjunction with the International Ballot Committee handled the mechanics of the election including the preparation, distribution, and counting of the ballots (¶ 28, Rule 9(g) Statement). Additionally, the AAA served as the central location for the inspection of membership lists and the distribution of campaign literature (¶28, Rule 9(g) Statement.)

The union through the AAA conducted the voting by mail ballot during the period from September 21, 1971 to December 22, 1971. (¶29, Rule 9(g) Statement).* Ballots were mailed by the AAA to members on September 21, 1971. (¶30, Rule 9(g) Statement). Ballots mailed to Offshore Division members were gray in color. (See Exhs. D1-D9, Rule 9(g) Statement). On the front side candidates for International office were presented; on the reverse side members of the Offshore Division were to vote for candidates in their respective locals.

Voted Ballots were returned by mail to the AAA in care of the American Bank and Trust Company, Bronx, New York where they were held in a vault until transferred to the offices of the AAA for counting. (¶¶ 32 and 36, Rules 9(g) Statement). A permit for business reply mail had been issued by the Bronx, N.Y. Post Office to the AAA for use in the election (¶34 Rule 9(g) Statement).

Ballots were required to be received in New York no later than midnight, December 21, 1971 (¶31 Rule 9(g) Statement).

Ballots were counted on December 22, 1971 (AAA cert.) (¶¶ 60 and 61, Rule 9(g) Statement).

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* The reason for the lengthy voting period is because the voters are so frequently at sea that one election date is not feasible. Also the voters are spread out all over the country so that a single place for personal voting is impossible

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On January 12, 1972 the AAA certification of the IOMM&P election results was signed (See Exhibit L to Rule 9(g) Statement) and this Certification of Results represents the final results of the elections except where run-offs were necessary (¶62, Rule 9(g) Statement).

The incumbents O'Callaghan, Caldwell and Lowen, won re-election to the three International offices. (See Exh. M. Rule 9(g) Statement; Admission 10). They, together with incumbant officers in the Offshore Division Port offices, ran as part of the "O'Callaghan team" (¶¶56, 57 and 58, Rule 9(g) Statement).* Those on the O'Callaghan team are all noted appropriately on Exhibit E annexed to the Rule 9(g) Statement. All** those on the O'Callaghan team at the December 22, 1971 counting of the ballots, either won outright or won a sufficient number of votes to enter a run-off. (See the AAA Certification of Results - Exhibit M; See also ¶69 and Exh. P, Rule 9(g) Statement).

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*There were a number of elections in which no incumbents ran. They were, nevertheless, supported by, and accordingly were part of, the O'Callaghan team. (See ¶ 58 (footnote), Rule 9(g) Statement).

** With the exception of one minor candidate. (See ¶ 58 (footnote), Rule 9(g) Statement).

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Challenges To The Conduct
Of The Election By Union
Members

The conduct of the election was challenged by sixteen IOMM&P members in good standing at various stages before, during and after the balloting (¶70, Rule 9(g) Statement. Lloyd Sheldon, a candidate for International President, was among the challengers. In all respects said sixteen members had properly exhausted all available internal remedies pursuant to the IOMM&P Constitution and Offshore Division By-Laws (¶71, Rule 9(g) Statement).

These members, individually and through their attorney, Burton Hall, had complained to the International Ballot Committee ("IBC") about various aspects of the conduct of the election (¶72 Rule 9(g) Statement).

In the letter dated January 7, 1972 from Robert Lowen, International Secretary-Treasurer for the IBC, to Burton Hall, complainants were advised that appeals to the IBC rulings were to be made to the General Executive Board ("GEB"). (¶73, Rule 9(g) Statement)

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On January 19, 1972 Burton Hall on behalf of the complaining union members addressed a letter of protest to the General Executive Board in care of Robert Lowen, International Secretary-Treasurer, IOMM&P. (¶74, Rule 9(g) Statement).

In an undated letter postmarked February 29, 1972 from Lowen to Hall, Complainants were advised that the General Executive Board had denied their appeals. (¶75, Rule 9(g) Statement).

Complaints to the Secretary of Labor

On March 29, 1972, the complainants through their attorney, Burton H. Hall, filed their complaint with the Secretary of Labor (¶76, Rule 9(g) Statement) as was required pursuant to 29 U.S.C. §482.

The complaint to the Secretary embodied the complaints as set forth in the January 19, 1972 letter of Burton H. Hall to the General Executive Board (¶¶77 and 78, Rule 9(g) Statement; see Exhibits W and Y annexed to Rule 9(g) Statements).

The United States Department of Labor conducted an investigation into the complaints lodged with the Secretary (¶79 Rule 9(g) Statement) and appropriately found probable cause to believe that violations of Title IV of the LMRDA (29 U.S.C. §481) had occurred and had not been remedied (Complaint ¶ VIII).

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The IOMM&P had extended the Secretary's time in which to file the instant action until December 28, 1972. (¶ 80, Rule 9(g) Statement). The case was commenced upon the filing of a complaint on November 28, 1972.

Facts Relating to Violations

"Newsletter"

On August 19, 1971 the IOMM&P mailed to each member a document entitled "60th Convention Newsletter on the Resolution of Affiliation of the IOMM&P with the ILA" (¶82, Rule 9(g) Statement). Said document is annexed to the Rule 9(g) Statement as Exhibit BB and will be referred to hereafter as the "Newsletter".

The cost of the preparation, duplication and distribution of this newsletter was paid for with monies received by the IOMM&P by way of dues, assessments or similar levy. (¶83, Rule 9(g) Statement). The union expended more than $3000 on the preparation, duplication and distribution of the Newsletter (¶84, Rule 9(g) Statement*)

*Throughout it has been admitted that the incumbent International Officers of the IOMM&P used union funds to prepare, duplicate and distribute this document. Although it has no bearing on the issue before this Court, it is noted that the amount defendant admits to spending varies: approximately $1,356.00 is admitted to in Admission #30. Answers to Interrogatories ¶17 admits spending $3,369.60 and the Addendum to O'Callaghan Deposition, in response to questions on p. 171, admits to spending $3,218.60. The only relevant point is that union funds were spent.

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and it was sent to approximately 10,400 members in a mailing done using addresses on file at the International headquarters on a computerized list (¶85, Rule 9(g) Statement).

Although this Newsletter purported to deal only with the question of the ILA merger, the document contained campaign statements vilifying the opposition and praising the incumbents.

With respect to this Newsletter, three candidates*, on September 16, 1971, brought an action in the United States District Court for the Southern District of New York against O'Callaghan, Caldwell, and Lowen and the IOMM&P. (¶85, Rule 9(g) Statement). They alleged, inter alia, that the Newsletter was campaign literature prepared and distributed at the expense of the defendant IOMM&P and that this denied the plaintiffs therein the right to have campaign literature equally distributed in violation of 29 U.S.C. §481(c). ¶87, Rule 9(g) Statement. See Sheldon v. O'Callaghan, 335 F. Supp. 325, 326 (S.D.N.Y., 1971).

*The three plaintiffs were Lloyd Sheldon (candidate for International President), Amos Koonce (candidate for International Executive Vice President) and Victor Soto (Candidate for Assistant Port Agent for the Port of New York). The docket number was 71 Civ. 4113.

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In a decision dated October 18, 1971 the Honorable Thomas F. Croake, United States District Judge for the Southern District of New York, found the "'Newsletter' containing electioneering for the incumbent candidate, ad hominem attacks upon an opposition candidate, coupled with the timing of the distribution, to constitute campaign literature for defendant O'Callaghan, distributed at the expense of defendant labor organization" Sheldon v. O'Callaghan, supra at p. 327. (¶88 Rule 9(g) Statement).

On November 4, 1971, Judge Croake, consistent with his October 18, 1971 decision, ordered the IOMM&P to publish and distribute literature submitted by the plaintiffs in that action in a manner similar to the publication and distribution given the Newsletter, with equal force and with equal treatment as to the expense of such distribution (¶89, Rule 9(g) Statement; See Exhibit DD annexed to Rule 9(g) Statement). Judge Croake denied the plaintiffs' motion to restrain the mailing of ballots. Plaintiffs had sought this relief to try to ensure that their material would be received by the members before the members cast their ballots. In doing so, however, the Judge commented as follows:

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> "A preliminary injunction is an extraordinary remedy granted, in the court's discretion, upon a clear demonstration of both probable success and irreparable injury. (Citations omitted). The LMRDA provides for post-election remedies, so as to prevent blocking or delaying of Union elections while affording adequate relief through enforcement by the Secretary of Labor if "upon a preponderance of the evidence after a trial upon the merits, the court finds. . . (2) that the violation of section 481 of this title may have affected the outcome of an election." LMRDA § 482(c). "[T]he intent of congress in establishing . . . post-election remedies was to allow the labor organization full scope to review its own election after it had taken place, and after many pre-election grievances had resolved themselves by the results of the election." Wirtz v. H.H. GUY lodge, No. 872. Bro. of Railraod Trainmen, 279 F. Supp. 873, 874 (W.D. Pa. 1967). The plaintiffs have not met their burden of showing irreparable injury in light of the enforcement procedures within §482 LMRDA and based upon the information submitted. (emphasis added) (at pp. 328-329)

Pursuant to Judge Croake's November 4, 1971 order, plaintiff Sheldon submitted his literature to the AAA sometime shortly before November 9, 1971. (¶ 91 Rule 9(g) Statement). The AAA mailed Sheldon's literature shortly after November 9, 1971. (¶92 Rule 9(g) Statement).

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By the time Sheldon's literature was mailed out, over half the ballots - 3000 to 4000 - had been returned to the AAA. (¶ 93 Rule 9(g) Statement)*

Sheldon was associated with a number of other candidates in the subject election (see ¶59, Rule 9(g) Statement). There were many - such as third and fourth parties in a race - who could claim no benefit from Sheldon's material, however, and were not covered by Judge Croake's order to the IOMM&P to allow distribution at IOMM&P expense.

Annexed to Exhibit EE is a "Chart " which, inter alia, sets forth the number of ballots returned, i.e. post-marked, by November 9, 1971 for each Offshore Division Port.**

*The American Bank and Trust Company to whom the voted ballots were sent, kept a daily tally of the ballots received. This is Exhibit N annexed to the Rule 9(g) Statement, a copy of which was also submitted by O'Callaghan in his Addendum to his Deposition as Exhibit G and which formed the basis for the stipulation that more than half the ballots had been received before the Sheldon material was sent out. Thereon it is noted that 3980 ballots had been received back by November 9, 1971. See, ¶¶ 65, 66, 67, 68 and 94 Rule 9(g) Statement.

**The Government maintains the preparation and mailing of the Newsletter at union expense in and of itself "may have affected the outcome of the election". If the IOMM&P were to argue that all candidates opposed to the O'Callaghan team benefitted from the distribution of the Sheldon material and this rectified the harm done by the Newsletter, this chart proves the opposite. It shows that the ballots returned for each Port by November 9, 1971 were greater than the number necessary, in view of the violations committed, to have possibly affected the result for each Offshore Division contest. See POINT II infra.

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"Eleven Pledges"

Annexed to the Rule 9(g) Statement as Exhibit FF is another document entitled "All Constitutional Amendments and Resolution of the 60th Convention Ratified-Affiliation of IOMM&P as the International Maritime Division of the ILA (AFL-CIO) Affirmed." This document was prepared and mailed by defendant IOMM&P, using the IOMM&P computerized list of members, to each of its members on or about November 26, 1971 (¶¶ 103 and 108, Rule 9(g) Statement) and the cost of its preparation, duplication and distribution was paid for with monies received by defendant IOMM&P by way of dues, assessments or similar levy (¶ 106, Rule 9(g) Statement).*

The Government contends this document constituted campaign literature prepared in violation of Section 481(g) and distributed in violation of Section 481(c), inasmuch as it went far beyond merely notifying members of the results of the merger referendum.

The third page of this document contained a letter from Teddy Gleason, ILA President, and Thomas F. O'Callaghan, President of the IOMM&P pledging their joint effort in eleven

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* The cost of the preparation, duplication and distribution was approximately $2800. (¶ 107, Rule 9(g) Statement).

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areas (¶ 104, Rule 9(g) Statement; see Exhibit FF, Rule 9(g) Statement)* a reminder, in bold face, of the impending December 21, 1971 deadline for the AAA to receive ballots cast for the election of officers.

From the time the "Eleven Pledges" went out until the end of the election period, there were 684 ballots returned, i.e. postmarked, to the AAA (¶ 109, Rule 9(g) Statement).

'Offshore Division Vice-Presidents (Atlantic) and (Gulf)"

The Offshore Division has three Vice-Presidents - one entitled Vice-President (Atlantic), another entitled Vice-President (Gulf) and the third entitled Vice-President (Pacific). By the provisions of the IOMM&P Constitution and the Offshore Division By-Laws they are vested with important duties and responsibilities concerning both the International and the Offshore Division.

The three Vice-Presidents are members of the General Executive Board of the IOMM&P (¶ 110, Rule 9(g) Statement; Art. V, Sec. 2, IOMM&P Constitution - Exhibit A, Rule 9(g) Statement). In a weighted fashion based on membership they cast votes on the General Executive Board

* This document, Exhibit FF, shall be referred to herein as the "Eleven Pledges".

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(¶ 111, Rule 9(g) Statement; Art. VII, Sec. 2, IOMM&P Constitution), which Board has certain duties and responsibilities as set forth in Article VII, Section 3 of the IOMM&P Constitution (see Exhibit A, Rule 9(g) Statement).

Additionally the three Offshore Division Vice-Presidents have separate duties and responsibilities to the Offshore Division as a whole, as set forth in Article VI, Sections 3 and 4 of the Offshore Division By-Laws (see Exhibit B, Rule 9(g) Statement).

The Government herein contests the 1971 election of two of the three Vice-Presidents, i.e. Vice-President (Atlantic) and Vice-President (Gulf), inasmuch as the IOMM&P, in violation of various provisions in section 481(e), prohibited many members in the Offshore Division's Atlantic and Gulf areas from participating in any way in the selection of said two Vice-Presidents.

Provisions of the International Constitution and the Offshore Division By-Laws did not allow for a direct vote by Offshore Division members for Offshore Division Vice-Presidential positions. Rather, they provided that members elected, in the 1971 election, to the offices of Port Agent for the Port of New York, the Port of San Francisco and the Port of Galveston automatically ascended to the positions of Vice-President (Atlantic), Vice-President (Pacific) and Vice-President (Gulf), respectively.

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(¶ 114 Rule 9(g) Statement; Art. XIX, Sec. 2(i), Offshore Division By Laws - Exh. B, Rule 9(g) Statement).

The Atlantic area consisted of the Port of New York (former Local 88); Port of Providence (former Local 5); Port of Boston (former Local 11); and the Ports of Baltimore, Philadelphia, Norfolk, Charlestown and Savannah (all in former Local 14). (See ¶ 116 and Exhs. D 1, 2, 7 and 8, Rule 9(g) Statement.)

Only members of the Port of New York could (and did) nominate, the candidates for and vote for Port Agent of New York. (See ¶ 115, Rule 9(g) Statement; see also Art. XIX, Secs. 2(c), (d) and (e) Offshore Division By-Laws, Exh. B, Rule 9(g) Statement).

The remaining members in the various Atlantic area Ports (those in former Locals 5, 11 and 14) were not eligible to nominate, be candidates for, vote for, or for that matter, hold the office of or support the candidate (s) of their choice for Port Agent of New York and therefore had no say whatsoever in determining who would become Offshore Division Vice President (Atlantic).

The situation was similar in the Gulf area. The Gulf area consisted of the Ports of Galveston, Houston and Port Arthur (all in former Local 20); the Ports of

Mobile and Tampa (both in former Local 4); the Ports of Jacksonville and Hollywood (both in former Local 24); and the Port of New Orleans (former Local 15). (See ¶ 118 and Exhs. D3, D4, D5 and D6, Rule 9(g) Statement.)

Only members of the Ports of Galveston, Houston and Port Arthur could (and did) nominate, the candidates for and vote for Port Agent of Galveston.*

The remaining members in the various Gulf area Ports (those in former Locals 4, 24 and 15) were not eligible to nominate, be candidates for, vote for, or hold the office of or support the candidate(s) of their choice for Port Agent of Galveston and therefore had no say whatsoever in determining who would become Offshore Division Vice President (Gulf).

In the Pacific area, the situation was different. There all Ports were in former Local 90. (See Exhs. C and D 9, Rule 9(g) Statement.) Accordingly, since all

* It is noted that for the 1971 election members of former locals voted, as was consistent with their procedure prior to the adoption of the new IOUM&P Constitution and Offshore Division By-Laws, for all officers in their respective locals (See Art. XIX, Sec. 2(b), Offshore Division By-Laws). Members in the Port of Houston, for example, could vote for the officers in the Port of Galveston inasmuch as both Ports were in former Local 10. Members in one Local, however, could not vote for the officers in the Ports of another Local. (See Art. XIX, Secs. 2(c),(d) and (e), Offshore Division By-Laws.)

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all members in the Ports within one Local voted for all the officers in the various Ports in said Local, all members in former Local 90 voted for the Port Agent of San Francisco who automatically became Vice-President (Pacific).

The scheme with respect to the selection of Vice Presidents (Atlantic) and (Gulf) denied absolutely section 481(e) rights to all members not in the Port of New York (former Local 88) and the Ports of Galveston, Houston and Port Arthur (former Local 20), respectively.

"Ballots Not Mailed Within 30 Days After Close of Nominations"

Nominations for the International and Offshore Division offices were over by July 28, 1971 (¶¶ 121, 122 and 123, Rule 9(g) Statement.)

Article V, Section 8(d) of the IOMM&P Constitution provides in pertinent part:

> "All ballots shall be mailed not later than the thirtieth day following the close of the nominating period at which nominations have been made."

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The Offshore Division By-Laws provided that the elections for Offshore Division offices were to be held simultaneously with the election for International offices and subject to the same rules and conditions outlined in the IOMM&P Constitution* (see Art. V, Secs. 3 and 4, Offshore Division By-Laws - Exhibit B, Rule 9(g) Statement).

Ballots for the 1971 election of officers were mailed September 21, 1971 (¶ 125, Rule 9(g) Statement).

Section 481(e) of Title 29, United States Code, provides in pertinent part:

> "The election shall be conducted in accordance with the constitution and by-laws of such [labor union] organization insofar as they are not inconsistent with the provisions of this chapter."

During the period between which the ballots should have been mailed (August 27, 1971) and when the ballots were mailed (September 21, 1971) the IOMM&P prepared and distributed to the members the IOMM&P

*Section 3 provides: "...subject to these same rules ... except as specifically provided for in these By-Laws." No provision of the By-Laws except the offshore Division from sending out ballots "not later than the close of the nominating period."

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publication "Master, Mate and Pilot"* (¶¶126-130), Rule 9(g) Statement). During this period, also, the members were in the process of voting on the merger referendum (the IOMM&P with the ILA). Merger referendum ballots had been sent out on or about August 20, 1971 to be returned by November 23, 1971. (¶ 131, Rule 9(g) Statement; see also "Eleven Pledges," p. 1 - Exhibit FF).

"Local 88 Membership List Not Provided to Candidates"

Article XIX, Section 2(b) of the Offshore Division By-Laws provides:

> Except as specifically provided by Convention action and membership referendum, the existing election procedures of the respective Offshore Locals in effect as of October 1, 1970 shall be as followed. (¶133, Rule (9(g) Statement)

*"Master Mate and Pilot" is annexed as Exhibit GG to the Rule 9(g) Statement. Judge Croake found this not to be "campaign literature." Nevertheless its circulation and "influence" during the period where ballots should have been mailed cannot be disregarded and therefore has significance with respect to this motion.

The Local 88 (now the Port of New York) By-Laws, with respect to its election procedure, had the following provision:

> A certified mailing list of all members of Local 88 shall be made available at cost to all candidates, provided however that any postage charges shall not be billed to this organization.
> (¶¶ 134, and 135, Rule 9(g) Statement)*

On August 30, 1971 the IOMM&P International Ballot Committee denied the request of certain Local 88 candidates for certified copies of the Local 88 mailing list (¶ 137, Rule 9(g) Statement).

In the action before Judge Croake, previously described in connection with the Newsletter, plaintiffs also sought to disgorge a certified mailing list of Local 88 members withheld in violation of the Offshore Division and Local 88 By-Laws. (¶ 138, Rule 9(g) Statement; see also Sheldon v. O'Callaghan, supra at p. 326 - Exhibit CC).

In his decision of October 18, 1971 Judge Croake found with respect to this issue:

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* No "Convention action and membership referendum" as referred to in Art. XIX, Sec. 2(b) of the Offshore Division By-Laws was taken to pre-empt or otherwise vary said Local 88 By-Law provision (¶ 136, Rule 9(g) Statement).

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> The facts, as presented by plaintiffs and not disputed by defendants, display a violation of the spirit of IMRDA as well as the letter of that law. The LMRDA endeavors to preserve the integrity of the election process as it is the core of Union democracy. Section 481 (e) LMRDA provides: "The election shall be conducted in accordance with the constitution and by-laws of such organization in so far as they are not inconsistent with the provisions of this subchapter." It appears there is "discrimination . . . against . . . [a] candidate with respect to the use of lists of members." Section 481(c) LMRDA. Defendants are directed, therefore, to make the mailing lists available to candidates for election to office in former Local 88. (¶ 139, Rule 9(g) Statement) Sheldon v. O'Callaghan, supra at 329.

November 4, 1971 Judge Croake ordered the IOMM&P "to make available to candidates for election to office in the former Local 88 or New York Branch . . . certified mailing lists of all members of the said former Local 88, at cost." (¶ 140, Rule 9(g) Statement, Exhibit DD, Rule 9(g) Statement).

Marvin Schwartz, Esq., as attorney for Defendant IOMM&P in Sheldon v. O'Callaghan, moved to reargue Judge Croake's decision with respect to that portion ordering former Local 88 certified mailing list be made available. (¶ 141, Rule 9(g) Statement).

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Judge Croake signed an endorsement (Exhibit II, Rule 9(g) Statement) on said motion to reargue which read as follows:

> The defendant International Organization of Masters, Mates, and Pilots, AFL-CIO, moves for reargument. The memorandum decision of this court, dated October 18, 1971, in part, directs defendants to make available to candidates for office in the former local 88 certified copies of the mailing list of members pursuant to the Labor-Management Reporting and Disclosure Act § 481(c)(e).
>
> Defendant now seeks, in his moving papers, relief from a remedy which was not granted. The court has not been requested in the complaint, nor has it ever ordered that plaintiff obtain "physical possession of mailing lists." This new issue is not properly presented in this motion for reargument.
>
> The motion to reargue is granted. Upon a review of all the circumstances, including the many letters with enclosures submitted by the parties, the decision of this court, dated October 18, 1971, is adhered to.
>
> SO ORDERED
>
> Dated: New York, N.Y.
> November 15, 1971
>
> THOMAS F. CROAKE
> U. S. D. J.

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By November 15, 1971 (the date of Judge Croake's endorsement) the American Bank and Trust had received 4245 ballots* (¶ 143, Rule 9(g) Statement).

O'Callaghan's, Caldwell's and Lowen's appeals of Judge Croake's November 4, 1971 order and November 15, 1971 endorsement order were dismissed by stipulation, so ordered by the clerk of the Court of Appeals July 13, 1972. (See ¶¶ 144, 149 and 146 and Exhs. JJ, KK and LL, Rule 9(g) Statement)

The IOMM&P's failure to adhere to those provisions requiring the production of the Local 88 mailing list constitutes another section 481(e) violation. The tardiness in its production, if it ever was produced, precludes the IOMM&P from now showing that the election was not affected by the violation.

* Information supplied to the Secretary is that plaintiff Soto actually never did receive the Local 88 list in time to be helpful in the election.

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ARGUMENT

POINT I

THE IOMM&P HAS THE BURDEN OF PROVING THE VIOLATIONS DESCRIBED IN POINTS II, III AND IV DID NOT AFFECT THE OUTCOME OF THE ELECTION.

The IOMM&P has the burden of proving the violations discussed in Points II, III and IV did not affect the outcome of the 1971 election of officers.

Section 402(c) of the LMRDA, 29 U.S.C. §482(c) states in pertinent part:

> "(c) If, upon a preponderence of the evidence after a trial upon the merits, the court finds --
>
> * * *
>
> (2) that the violation of Section 481[401 of the LMRDA] of this title may have affected the outcome of an election,
>
> the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary..."

Wirtz v. Hotel, Motel & Club Employees U., Local 6, 391 U.S. 492, 506-507 (1968) established the principle that a proved violation of Section 481 establishes a prima-facie case that the violation "may have affected the outcome" of the election and that the only way a defendant union may overcome such a prima facie case is to prove the violation did not affect the outcome of the election.

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In that case the Secretary alleged and the Supreme Court so held, that a by-law of the defendant Local limiting eligibility for major elective offices to union members who held or had previously held certain elective office was not a "reasonable qualification" to hold office as prescribed in 29 U.S.C. §481(c) and that the enforcement of the by-law may have affected the outcome inasmuch as it denied members the opportunity to hold elective office. The Supreme Court then ordered a new election held under the Secretary's supervision.

The Court examined the factors considered by the district court and reasoned that the factors presented by the defendant union did not constitute evidence which met the prima facie case established by the violation. The Court stated, Hotel, Motel, supra at 508:

> None of the factors relied on is tangible evidence against the reasonable possibility that the wholesale exclusion of members did affect the outcome. Nothing in them necessarily contradicts the logical inference that some or all of the disqualified candidates might have been elected had they been permitted to run. (emphasis supplied)

In summary, once the prima facie effect of a proved Section 401 violation is present in a case, the district court must examine the defendant's evidence and determine whether the defendant's evidence establishes that the Section 481 violation did not affect the outcome of the election.

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The Secretary will prevail on the issue, if the district court finds that the defendant's evidence does not establish that the Section 481 violation did not affect the outcome of the election.

The mechanics of the Supreme Court's holding have been applied in subsequent case, involving different alleged violations of 29 U.S.C. §481.

In Brennan v. Sindicato Empleados de Equipo Pesado, Etc., 370 F. Supp. 872, 879 (D.C.P.R. 1974) the Court stated:

> "13. Once a violation has been proved by a preponderance of the evidence, the existence of that violation establishes a prima facie case that the violation may have affected the outcome of the election. Wirtz v. Hotel, Motel and Club Employees, Local 6, 391 U.S. 492, 88 S.Ct. 1743, 20 L.Ed.2d 763 (1968). A section 401(g) violation has a potential for influencing every vote cast in an election in a way which is not susceptible of precise measurement. The plaintiff, in establishing the previously discussed violations of section 401 (g), has sustained his burden and has presented a prima facie case that the violations may have affected the outcome of the election. Sufficient evidence was not presented by defendant that the evidence did not affect the outcome."

The violations described in POINT II, infra, involve, among others, 401(g) [29 U.S.C. §481(g)] violations.

The Third Circuit, in Wirtz v. Local 153, Glass Bottle Blowers Ass'n of U.S. Can., 405 F.2d 176, 177-178 deciding a case involving a section 481(e) violation on remand from the Supreme Court, expressed it this way:

> "In ruling that the record did not adequately show a relation of cause and effect between the restriction on candidacy and the outcome of the election, the district court did not have the guidance now afforded by the Supreme Court in Wirtz v. Hotel, Motel and Club Employees Union, Union Local 6, 391 U.S. 492, 88 S.Ct. 1743, 20 L.Ed.2d 763, decided June 3, 1968. In that case it was decided that proof that an election was held under a rule unreasonably restricting members from being candidates for office in violation of secion 401(e) in itself created an inference amounting to a prima facie showing that the wrongful restriction "may have affected the outcome" of the election. It then became the union's burden to establish that the violation did not in fact affect the outcome of the election.
>
> The union made no such showing here. The present record provides no evidentiary support for a conclusion that the violation had no effect upon the challenged election. It does show that 8 elective offices were to be filled and that the rule restricting candidacy made all but 10 of the several hundred members of the union ineligible. Moreover, because none of the 10 eligible members were candidates for 4 of the offices, these offices were subsequently filled by appointments. Certainly, it is not impossible that this result would have been different if candidacy for election had not been so severly restricted."

The Circuit Court for the District of Columbia recently granted summary judgment to the Secretary in a case involving two section 481(e) violations. Brennan v. Local U. No. 639, Int. Bro. of Teamsters, Etc., 494 F.2d 1097 (D.C.Cir. 1974).

The Court therein expressed the following with respect to the standards of proof:

> "B. Section 402 provides that the Secretary must prove by a preponderance of the evidence that the result of the election "may have been affected" by the violation. In Wirtz v. Local 1622, Carpenters, 285 F.Supp. 455 (N.D. Cal. 1968), the court held that, under this standard, "The Secretary is only required to prove 'the existence of a reasonable probability that the election may have been "affected" by an alleged violation of § 481(e) [§ 401(e)]." Id. at 464. In Wirtz v. Local 6, 391 U.S. 492, 88 S. Ct. 1743, 20 L.Ed.2d 763 (1968), the Supreme Court held that a proved violation of § 401 created a prima facie case that the election may have been affected."

After reciting certain relevant facts the Court then proceded:

> "It is clear from the uncontested facts that the Union's failure to mail notices was a violation of § 401(e) and that a prima facie case was established for setting aside the election. The only question is whether the additional facts relied upon by the Union are material and whether they rebut the presumption that the election was affected."

Citing a number of cases the D.C. Circuit Court, at p. 1098, continued:

> These cases clearly show that the facts set forth by the Union, even if true, were not material facts which would prevent the granting of summary judgment. As the Supreme Court said in Wirtz v. Local 6, 391 U.S. 492, 508, 88 S.Ct. 1743, 1752, 20 L.Ed.2d 763 (1968): "None of the factors relied on is tangible evidence against the reasonable possibility that the wholesale [failure to mail notice] did affect the outcome.." The uncontradicted evidence showing that the Union had violated § 401(e) created a prima facie case that the election may have been affected.

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> Since the Union was unable to contradict this by raising any factual dispute as to a material fact, the district court correctly held that the Secretary was entitled to a summary judgment.

Judge Pierce in Shultz v. Radio Officers' U. of United Telegraph Wkrs., 344 F. Supp. 58, 64 (S.D.N.Y., 1972)*, in a case involving section 481(e) and 481(c) violations, set forth the rule in this way:

> "The rule governing the standard of proof which the Secretary of Labor must meet in order to establish that the outcome of the election may have been affected was announced in Wirtz v. Hotel, Motel & Club Employees Union, 391 U.S. 492, 88 S. Ct. 1743, 20 L.Ed.2d 763 (1968). There it was held that a proved § 481 violation should be treated as prima facie proof that the outcome was affected. Id. at 506-507, 88 S. Ct. 1743. See Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 405 F.2d 176, 177 (3d Cir. 1968). The Court held such construction "peculiarly appropriate" where the violation was exclusion of a candidate, citing with approval Wirtz v. Local Unions 410, 410A, & 410C, Int'l Union of Operating Eng'rs, 366 F.2d 438 (2d Cir. 1966). In this latter case, the Court noted that attempting to estimate the impact on the outcome of an election of a condidate represented an exercise in speculation; the requirement of § 482(c)(2) is met if there is a reasonable probability that the outcome may have been affected by the violation."

Concerning a 481(e) violation in which the incumbant threats forced an insurgent candidate to withdraw from the race, Judge Pierce, at p. 65 held:

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* Defendant union in that case was represented by the same counsel who represents the IOMM&P herein.

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> Here the Secretary has established a violation and therefore prima facie proof that the outcome was affected. Defendant has not adduced a single shred of evidence tending to rebut the presumption that its interference with Parnell's candidacy affected the election results. The Court notes that Parnell was a popular member of the ROU, having been elected to the office of National Committeeman-Oakland eight or nine times prior to his retirement. The Court concludes that there was a reasonable probability that the outcome of the election for National Committeeman-Oakland may have been affected by the withdrawal of Parnell.

With respect to the 481(c) violation*, Judge Pierce's conclusion was the same:

> [13] The union has failed to introduce any rebuttal evidence demonstrating that the violation was innocuous. The Court is not required to engage in speculation on this issue. The Court thus must conclude that there is a reasonable probability that the outcome of the election may have been affected by the violation.

In Hodgson v. Liquor Salesman's Union, Local No. 2, 334 F.Supp. 1369 (S.D.N.Y.), aff'd, 444 F.2d 1344 (2nd Cir. 1971), this Court considered a 481(g) violation in which a union publication (the "Journal") was considered campaign material.

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* The union had failed to provide an insurgent candidate with a certain requested list of members, the use of which was at the incumbant's disposal.

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Applying the logic of the Hotel, Motel case, supra, this Court held that the Secretary met his burden of proving that there was a "'reasonable probability that the violation may have affected the outcome of the election." Inasmuch as the defendant union did not - and indeed in this case could not - present sufficient rebuttal evidence. This Court held:

> This court, therefore, holds that the Secretary has established, by a preponderance of the evidence, that § 481(g) was violated by the Union in the conduct of the election. 29 U.S.C. § 482(c). The evidence disclosed that the challenged issue of the Journal reached the members prior to the January 9, 1970 election. The court therefore, reaches the question whether there is a reasonable probability that the violation of §481(g), which it has found, may have affected the outcome of the election. 29 U.S.C. § 482(c); Wirtz v. Hotel Employees Union, 391 U.S. 492, 507, 88 S. Ct. 1743, 20 L.Ed.2d 763 (1968); Wirtz v. Local Union 410, etc., 366 F.2d 438, 443 (2d Cir. 1966).
>
> As the election tally reveals, the margin of victory for the incumbents was narrow in most instances, e.g., the incumbent president won by 77 votes; the executive secretary won by 86 votes; the 2d vice president won by 70 votes; the treasurer won by 45 votes; and the financial and recording secretary won by only 6 votes.
>
> [4] In cases such as this, "there can be no tangible evidence available" of the effect of the violation. Wirtz v. Local Union 410, supra, at 443. Shultz v. Local Union 6799, supra, 426 F.2d at 972-973.

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> The court finds that there is "a reasonable probability" that the violation may have affected the outcome of the election.

In the instant case the violations described in POINTS II, III and IV, infra are proved inasmuch as the facts establishing them are no longer in controversy. In accord with its burden, the IOMM&P will not be able to present any tangible evidence to prove the violations it committed did not affect the outcome of the election. It cannot overcome the prima facie presumption of the "reasonable possibility" the violations described in POINTS II, III and IV may have affected the outcome of the election.

No "tangilble evidence" can contradict the "logical inference" that these violations may in some way have had some affect on the outcome of the election. See Hotel, Motel & Club Employees, Local 6, supra, at 508.

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POINT II

CAMPAIGN LITERATURE WAS PREPARED AND DISTRIBUTED AT UNION EXPENSE AND WITH UNION RESOURCES IN VIOLATION OF SECTIONS 481(g) and 481(c)

Pursuant to section 401(g) of the LRMDA, 29 U.S.C. §481(g), no union funds may be used to promote the candidacy of any candidate for election.*

Additionally, pursuant to section 401(c) of the LRMDA, 29 U.S.C. §481(c), a labor organization must "refrain from discrimination in favor of or against any candidate with respect to the use of lists of members" and when distributing campaign literature on behalf of one candidate it and its officers must make similar distribution on behalf of another candidate if requested to do so.**

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* 29 U.S.C. §481(g):

> (g) No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this subchapter. Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election.

(Continued on next page)

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(Footnote continued)

** 29 U.S.C. §481(c) in pertinent part reads:

> (c) Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution.

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There are three pieces of literature which were prepared and distributed to the union members by Captain O'Callaghan and the IOMM&P at union expense, and with use of union membership lists, for the benefit of O'Callaghan and his slate of candidates; each piece, the Government contends, constitutes campaign literature in support of Captain O'Callaghan and his slate of candidates.

There is no question remaining, the Government submits, that at least two of these three documents caused Captain O'Callaghan and the IOMM&P to violate the above mentioned provisions of section 481 and that such violations may have affected the outcome of the election - thereby mandating, pursuant to 29 U.S.C. §482(c), that a new election be ordered subject to the supervision of the Department of Labor. Accordingly this summary judgment motion is made with respect to these two. Proof that either one of these pieces of literature so violated the law such that it may have affected the outcome of the election, indeed would be sufficient to have the provisions of 29 U.S.C. §482(c) invoked.*

First Piece of Campaign Literature - "Newsletter"

On August 19, 1971 the IOMM&P mailed to each member a document entitled "60th Convention Newsletter on the Resolution of Affiliation of the IOMM&P with the ILA" ("Newsletter"). (¶¶82-85 and Exh. BB, Rule 9(g) Statement).

* The Government seeks to have all the elections for

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footnote (cont'd) -2-

International office and Offshore Division offices voided and new elections ordered. This is so despite the fact that the candidates for a few of the Offshore Division offices ran unopposed. As held in Wirtz v. Local Union 169 International Hod Carriers, etc., 246 F. Supp. 741, 754 (D. Nev. 1965), "An election conducted with violations of the Act which may have affected the outcome as to one office is void as a whole." Further, an order to re-run the entire election is reasonable under the present circumstances. First, only a few candidates did run unopposed. Second their terms of office are just about over. The IOMM&P is now conducting a new election for International and Offshore Division Officers. As provided out in Point VI, infra, this new election will not moot the present case and will necessarily be voided should the Court void the 1971 election.

The cost of the preparation, duplication and distribution of this Newsletter was paid for with union funds amounting to more than $3000.00.* And it was sent to approximately 10,400 members in a mailing using a computerized list of addresses on file at the International headquarters. (¶¶ 84 and 85, Rule 9(g) Statement).

Although this Newsletter purported to deal only with the question of the merger with the International Longshoreman's Association, the document contained compaign statements villifying the opposition and praising the incumbents in violation of sections 481(g) and (c) of Title 29, United States Code.

With respect to this Newsletter, three candidates, on September 16, 1971, brought an action against O'Callaghan, Caldwell and Lowen and the IOMM&P. They alleged, inter alia, that the Newsletter was campaign literature prepared and

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* As noted in the footnote to ¶84, Rule 9(g) Statement the amount defendant admits to spending varies. The only relevant point is that union funds were spent. Shultz v. Local Union 6799, United Steelworkers of America, 426 F.2d 969 (9th Cir. 1970), aff'd, 403 U.S. 333 (1971); Hodgson v. Liquor Salesmen's Union, Local No. 2, 334 F.Supp. at 1378 (SDNY), aff'd, 444 F.2d 1344 (2nd Cir. 1971).

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distributed at the expense of the defendant union and that their request to have the IOMM&P distribute their comparable literature prior to the balloting had been denied. This, plaintiffs argued, denied them, in violation of 29 U.S.C. §481(c), the right to have campaign literature similarly distributed.

In a decision dated October 18, 1971 (Sheldon v. O'Callaghan, 335 F.Supp. 325 (S.D.N.Y. 1971) -- annexed as Exh. CC, Rule 9(g) Statement), the Honorable Thomas F. Croake, United States District Judge for the Southern District of New York, found the Newsletter "to constitute campaign literature for defendant -- O'Callaghan distributed at the expense of defendant labor organization" and that it contained "electioneering for the incumbent candidate, ad hominem attacks upon an opposition candidate, ..." (at p. 327). Judge Croake in his opinion cited various passages of campaign oratory benefitting O'Callaghan and his slate which we set forth in the margin.*

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* Footnotes 1 and 2 in Judge Croake's opinion are as follows:

> '1. For example, the "Newsletter" notes an executive vice-president of the ILA as saying 'I trust 'O'Callaghan, and if O'Callaghan wasn't the top man here I'd think twice before saying I want the affiliation to go through with the Masters, Mates and Pilots.' ' . . . O'Callaghan I trust.' ("Newsletter," p. 5.).
>
> In addition, Congressman Edward A. Garmatz, Chairman, House Merchant Marine and Fisheries Committee, is quoted as saying, "I commend the foresight and the courage of my two long-standing friends, Tommy O'Callaghan

and Teddy Gleason, President of the ILA. It takes courage to make a major step such as this AFFILIATION. And their action renews my conviction that they are both dynamic leaders.

'I think the maritime industry of the future will require such leadership. It will need more men like these two, men who have the forceful determination to break precedent, to hurdle obstacles, and to blaze fresh, forward-moving trails.' ("Newsletter," p. 2.)

"2. For example, note the following: Teddy Gleason, International ILA President and Vice-President of the AFL-CIO executive council is quoted as saying. 'When they (referring to IOMM&P 'opposition' leaflets in his possession) bring up such questions as racism in connection with the AFFILIATION it turns my stomach . . . and when I see a man who was once head of the IOMM&P for years hooking up with this propaganda . . . for personal gain, and nothing else; this from a man who has been around this industry and labor for more than 15 years . . . doing this for the sake of job . . . it makes me sick again.

'I believe in a guy fighting like hell within his union, within his union [sic]. I believe in labor democracy, union democracy. But I don't believe in anybody taking money from somebody else to put out propaganda trash like this stuff. (Italics in original.)

'We have copies of the paid bills, paid from outside sources, for printing of the anti-IOMM&P-ILA propaganda. We know where this trash was printed, who paid and when. And I tell you, if anyone in the IOMM&P took outside money to print this material trying to bring about disruption within your own organization, then it's wrong, very wrong.

'I think you all know me. If anyone wants to get up and say his piece, I admire him for doing that. But I don't think anyone, including me, should go outside of our ranks to hurt our own organization. No union man should do it, no one else in other organizations should go outside of his ranks. He should fight like hell within his own ranks to make the changes he wants. (Italics

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in original.)' ("Newsletter," p. 3.)

'A "Newsletter" article headed 'A VOICE OF THE OUTSIDER, AND INSIDE MOUTHPIECES,' states: 'There is not the slightest doubt that Mr. Calhoun [NMEBA leader opposed to IOMM&P-ILA merger] is keeping his word, he is speaking out in leaflets, pamphlets, and subversion--through his flunkies, character assassins, racists, and finks who pollute the waterfront with propaganda against the leadership of the IOMM&P, and the ILA, with mindless, poisonpen, libelous anti-labor trash. They are speaking out in his words, parroting his exact phrases and ideas. Groups, and cliques who spread the garbage suck the curdled milk from the mother wolf who inspires the wolfpack.

A "Newsletter" article entitled, 'PRESIDENT O'CALLAGHAN RESPONDS TO A CONVENTION DELEGATE,' states, 'The lunatic fringe are working all angles, racism, red herrings, bigotry and slander. That's the kind of thing and the people that we are dealing with.' ("Newsletter," p. 6.)

Necessarily the defendant IOMM&P is bound by the findings in that case. As a party thereto, in which the identical issues - with respect to questions of whether the Newsletter was campaign material distributed at the expense of the IOMM&P - were litigated in a similar context as the one herein, the IOMM&P would be collaterally estopped from asserting any findings contrary to those made by Judge Croake. See Zdanok v. Glidden Co., 327 F.2d 944, 954-56 (2d Cir.) cert. denied, 377 U.S. 934 (1964).

Notwithstanding Judge Croake's findings, it can hardly be questioned that the passages cited by Judge Croake as well as the fact that the whole document was mailed within a short time prior to the commencement of the balloting must lead one to conclude this document is campaign literature and that it benefitted O'Callaghan and those running with him.* Further it has been admitted that it was prepared and distributed using union funds. (¶ 83 Rule 9(g) Statement).

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* The whole document need not be considered campaign material; it is sufficient that the document contain passages which are campaign in character for the whole piece to fall in the campaign material category. See Wirtz v. Independent Workers Union of Florida, 272 F. Supp. 31 (M.D. Fla. 1967).

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As campaign material this Newsletter benefited O'Callaghan. Likewise this document benefited all those candidates associated with O'Callaghan - his whole team. In this case his team includes not only Caldwell (running for Vice President) and Lowen (running for Secretary - Treasurer), but also all those incumbents running for the various Offshore Division Port Offices and certain others in Offshore Division Port contests where no incumbent was running (see ¶¶ 56, 57 and 58, Rule 9(g) Statement).

O'Callaghan's campaign literature (Exhs. G - L, Rule 9(g) Statement) makes it clear he was running with such a team.* Indeed he so stated at his deposition (See pp. 207 to 211, O'Callaghan Deposition) as did Lowen in his (See pp. 89 to 90, Lowen Deposition). Clearly, then, the Newsletter benefited them all.

The Newsletter has been found by a Judge in this Court to be - and indeed it is - campaign literature. It was prepared and distributed at union expense; and it was mailed by the IOMM&P using the IOMM&P's list of

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* See statement under O'Callaghan name on election ballots (Exhs. D1-9.) Also note how names of opposition and opposition's statements are blurred on Exh. G.

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members. These facts, no longer in controversy, require a finding in this case that the IOMM&P violated Sections 401(g) and 401(c)* of the LRMDA, 29 U.S.C. §§481(g) and (c).

By distributing this Newsletter to the benefit of O'Callaghan and his team without providing similar distribution requested by opposition candidates, the IOMM&P violated Section 481(c) in another respect as well, namely that part which reads:

> "... whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution..."**

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* 401(c) inasmuch the labor organization did not "refrain from discriminating in favor of or against any candidate with respect to the use of lists of members."

** Although defendant may argue that Judge Croake attempted to rectify the violation by ordering the IOMM&P to distribute similar literature on behalf of plaintiffs in that action, Judge Croake's order came too late; the violation - the preparation and sending out of the Newsletter - had already taken its toll as will be discussed shortly. As this court in Wirtz v. American Guild of Variety Artists, 267 F. Supp. 527, 543 (S.D.N.Y. 1967) so aptly put it, similar distribution means on the same terms and conditions and that means "at the same time."

Moreover, Judge Croake acknowledged that his order did not preclude the Secretary from seeking post-election relief under the LRMDA (¶90, Rule 9(g)Statement).

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Violations of §401 of the LRMDA having been established, all that remains is to show that said violations "may have affected the outcome of the election" (§402(c)(2) of the LRMDA, 29 U.S.C. §482(c)(2)); and in this regard IOMM&P has the burden of proving said violations did not affect the outcome of the election. See POINT I, supra.

In the instant case, with respect to the violations caused by the IOMM&P's financing and distributing of the Newsletter (a 481(g) and two 481(c) violations), the defendant cannot show that such violations did not affect the outcome of the election. While at most there need only be a "reasonable probability" that a violation may have affected the outcome of the election. The facts actually show the violations probably did have an affect on the election.

The Newsletter was campaign material beneficial to O'Callaghan and his team; and this fact alone, that it was beneficial to them - may have had an affect on the outcome of the election. As the Court noted in Sindicato Empleados, supra, at 879, such a violation "has a potential for influencing every vote cast in an election in a way which is not susceptible of precise measurements."

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It is only important to know 1) that the Newsletter went out in violation of 481(g) and (c) in time for the membership to receive it before they voted and 2) that O'Callaghan and his team won.* This Court, dealing with a virtually identical situation in Hodgson v. Liquor Salesman's Union, Local No. 2, supra, at p. 1378, logically explained "In cases such as this 'there can be no tangible evidence 'available' of the effect of the violation."**

It is evident that the violations caused by the Newsletter "may" have affected the outcome of the election. The IOMM&P can present no tangible evidence -- whether now in their possession or subsequently gathered -- that it did not.

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* The same logic applies to those Offshore Division Port offices where a run-off was required; had the violations not occurred the outcome may have been different. This is so also in the election for Assistant Port Agent of San Francisco where an O'Callaghan team member had come in second but a run-off was required because the victor had not received a sufficient plurality (in this instance the incumbent ultimately won). Had the O'Callaghan team campaign literature not gone out in violation of 481(g) and (c) those who made the run-offs may have been different.

** In that case the incumbents distributed the December, 1969 and January 1970 edition of the Journal, a union publication, prior to the January 1970 election of officers. The Court determined the Journal to constitute campaign literature and found a reasonable probability that said violation may have affected the outcome of the election.

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On November 4, 1971, Judge Croake, consistent with his October 18, 1971 decision, ordered the IOMM&P to publish and distribute comparable literature submitted by the plaintiffs in that action in a manner similar to the publication and distribution given the Newsletter, with equal force and with equal treatment as to the expense of such distribution (¶89 and Exh. DD, Rule 9(g) Statement)

Pursuant to Judge Croake's order, plaintiff Sheldon submitted his literature to the AAA sometime shortly before November 9, 1971. (¶ 91 Rule 9(g) Statement). The AAA mailed Sheldon's literature shortly after November 9, 1971 (¶ 92 Rule 9(g) Statement).

Should the IOMM&P argue that this action taken pursuant to Judge Croake's order was a corrective measure and, therefore, that the violations caused by the Newsletter did not affect the outcome of the election, they would be wrong. First, Judge Croake's opinion gave only the plaintiffs <u>in that case</u> the right to distribute comparable literature through the IOMM&P services. It did not provide the same opportunity to candidates who were not plaintiffs - not to candidate Wright (the third candidate running for International President), nor to other insurgent candidates not affiliated with Sheldon. Second, it can be shown that the ballots voted and returned prior to the Sheldon mailing were so numerous as compared to the

margins of victory, that one must still conclude the Newsletter violations may have affected the outcome of the election.

By the time Sheldon's literature was mailed out, over half the ballots cast - 3,000 to 4,000 - had been returned. (¶ 93 Rule 9(g) Statement)*.

The Newsletter may very well have influenced those who voted prior to receiving the Sheldon material. Certainly there exists a reasonable possibility of that fact and the defendant union cannot prove, with tangible evidence, otherwise.

O'Callaghan's margin of victory over Sheldon was 410 and over Wright was 1125. Inasmuch as 3,000 to 4,000 ballots had been returned by November 9, 1971 the outcome may have been affected by the Newsletter even if it could be argued that the Sheldon material distributed approximately November 9, 1971 would have been "corrective" from that date on. O'Callaghan's election must be voided.

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* See also ¶ 94, Rule 9(g) Statement.

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A similar situation exists with the whole O'Callaghan team. The Newsletter benefited them all and each one on the team was victorious by less than the total ballots relating to their individual races which had been cast prior to November 9, 1971*.

O'Callaghan's Vice Presidential Candidate Caldwell beat his two opponents Koonce and Vance by the following count 2299 to 1543 to 879 (See Exh. M, Rule 9(g) Statement).

Secretary-Treasurer Lowen, who ran with O'Callaghan, beat Norstrand and Balser by a count of 2343 to 1519 to 854 respectively (See Exh. M, Rule 9(g) Statement).

With respect to the remaining races in the Offshore Division the conclusion must be the same.

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* The logic is the same with respect to run-offs. All (except for J. Haring, candidate for Assistant Port Agent, Wilmington - in former Local 90) on the O'Callaghan team were either victorious or made the run-offs. If it weren't for the Newsletter, those making the run-offs "may" not have done so. For each, the "tainted" ballots cast by November 9, 1971 were more than enough than the number that would have been arithmetically necessary to possibly change the results. (See the "Chart" annexed to the O'Hanlon affidavit -- Exh. EE, Rule 9(g) Statement).

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For each race (except those in which a candidate ran unopposed) the margin of victory was less than the total ballots received by November 9, 1971 which would be sufficient to change the outcomes. This applies to the run-offs as well. The AAA certification of results provides the initial counts for each race and, as set forth in the O'Hanlon Affidavit (Exh. EE, Rule 9(g) Statement) when compared to the ballots returned by November 9, 1971* it is apparent - considering defendant cannot meet its burden of proving otherwise - that each election "may have been affected" by the above Section 401 violations.

This Court in Wirtz v. American Guild of Variety Artists, 267 F.Supp. at 547, in determining that a proved violation may have affected the outcome of an election stated: "Thus it can be demonstrated that the 472 ballots received before the Davis [the insurgent] literature was mailed greatly exceeded one-half of the margin by which any of the Haley [the incumbent] candidates defeated a Davis candidate. This has been demonstrated without including any of the 533 ballots received on Monday, August 16."

The evidence shows that "enough members voted before they received the ...[Sheldon]...slate literature to present in this case 'the existence of a reasonable

* November 9, 1971 is the earliest date on which Sheldon's material may have been mailed by the AAA. It is reasonable to assume the material would not have been received by the members until November 11, 1971. Accordingly the Chart annexed to the O'Hanlon affidavit also compares the ballots cast as of November 11, 1971.

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probability that this statutory violation[s]' may have affected the outcome of the election.'" Wirtz v. American Guild of Variety Artists 267 F. Supp., supra, at p. 541. (The Court in Variety Artists was evaluating the impact of one particular 481(c) violation and at p. 544 of the opinion came to the same conclusion with respect to another 481(c) violation. The logic, of course, is the same with respect to any violation under 481 for the question posed is whether any violation may have affected the outcome of the election in question.)

Even if mailing the Sheldon material pursuant to Judge Croake's order could be interpreted as correcting any wrongdoing with respect to candidate Sheldon, it could not have had any corrective effect vis a vis those candidates not affiliated with Sheldon.* Judge Croake's order did not include these non-Sheldon affiliated candidates and these candidates did not in fact distribute literature pursuant to Judge Croake's order using the IOMM&P's list of members. The prohibition against using union funds "to promote the candidacy of any person" (section 481(g)) and against "discrimination in favor of or against any candidate with respect to the use of list of members" (section 481(c)

* ¶53 and Exh. MM, Rule 9(g) Statement, sets forth those possibly associated with Sheldon. Members for a Democratic Union ("MDU") was primarily a Local 88 organization with which Sheldon was affiliated (see Exh. MM Rule 9(g) Statement) The West Coast Mates, a Local 90 organization,

Footnote (Cont'd.) -2-

did support Sheldon Koonce and Norstrand (see Exh. NN Rule 9(g) Statement). Conceivably one could link those candidates associated with these two groups and claim they all benefited from the Sheldon literature distributed after November 9, 1971. That still leaves other candidates not "benefiting" from Judge Croake's order; this is all in addition to the major factor which is simply that Sheldon's literature was mailed too late given the great number of ballots returned before Judge Croake's order became operative.

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(emphasis added)) is to be applied uniformly. These additional candidates need not have requested the opportunity to mail comparable literature to trigger said violations.*

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* Only that prohibition in section 481(c) against dissimilar distribution requires a request by a bona fide candidate to have said violation invoke the remedies of 482(c). In dealing with a section 481(g) violation the Ninth Circuit in Shultz v. Local Union 6799, United Steelworkers of Amer. 426 F.2d 969, 972 (9th Cir. 1970), affirmed 403 U.S. 333 (1971), reasoned:

> Likewise unconvincing is appellees' argument that a union is not in violation unless it grants the request of one candidate for financial aid and rejects that of another. Granted that the object of the section is to prohibit discrimination between candidates and that this condition would not exist if a union contributed equally to all candidates for a particular office, the inference is plain that the unlikely probability of even-handed union financial aid to several candidates, as well as financial aid to an individual candidate, is equally prohibited. Congress declared in the second of the two sentences comprising the provision that "Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates and other expenses necessary for the holding of an election." (emphasis added)

The defendant IOMM&P cannot prove with "tangible evidence" that its violations of sections 481(g) and (c) did not affect the outcome of the election, whether compared to Sheldon and his affilliates or to the third party candidates.

This Court, in Hodgson v. Liquor Salesman's Union, Local No. 2, 334 F. Supp. at 1377, quoting a passage of a District of Columbia District Court opinion noted the purpose of 481(g):

> "This court agrees that,
>
> > 'The obvious purport of ¶401(g) of the Act is to prohibit a labor organization from showing a preference for any one candidate and to prevent candidates from depleting union treasuries through election campaigns. It was aimed at all candidates but especially toward incumbents who, once in office, might abuse their trust to become more entrenched. The section reflects the principle of union democracy that individual members are free to support persons of their own choosing in an election and cannot be forced directly or indirectly by dues diversion to lend support to others whom they oppose." Retail Clerks Union, Local 648 v. Retail Clerks International Ass'n, 299 F.Supp. 1012, 1023 (D.D.C. 1969).

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The logic is the same in the instant case. Section 481(g) having been violated and it being impossible for the union to prove that said violation did not affect the outcome of the election, the subject election must be overturned.

By allowing union financed literature to be distributed through use of union mailing lists the incumbents have further demonstrated illegal misuse of their own power. The "incumbent's advantage" is no folly; it is amply demonstrated by the 481(c) violations as well as the 481(g) violation with respect to the "newsletter".

Any one of three violations caused by the Newsletter must void the election.*

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* It should be pointed out that the remedy Judge Croake provided for plaintiffs does not preclude this Court from granting the relief the Government seeks in this case. Judge Croake denied the plaintiff's motion to restrain the mailing of ballots. Plaintiff had sought such a stay in an effort to have their material also received in advance of the mailing of the ballots. In denying this relief, however, the Judge specifically commented as follows:

> "A preliminary injunction is an extraordinary remedy granted, in the court's discretion, upon a clear demonstration of both probable success and irreparable injury. (Citations omitted). The LMRDA provides for post-election remedies, so as to prevent blocking or delaying of Union elections while affording adequate relief through enforcement by the Secretary of Labor if "upon a preponderance of the evidence after a trial upon the merits, the court finds. . . (2) that the violation

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FOOTNOTE (Cont'd) -2-

> of section 481 of this title may have affected the outcome of an election." IMRDA §482(c). "[T]he intent of congress in establishing . . . post election remedies was to allow the labor organization full scope to review its own election after it had taken place, and after many pre-election grievances had resolved themselves by the results of the election." Wirtz v. H.H. Guy Lodge, No. 872. Bro. of Railroad Trainmen, 279 F.Supp. 873, 874 (W.D. Pa. 1967). The plaintiffs have not met their burden of showing irreparable injury in light of the enforcement procedures within §482 IMRDA and based upon the information submitted. (emphasis added)

Certainly the Secretary of Labor is not precluded from prosecuting this action. Nor were the complainants prevented from seeking such assistance from the Secretary. It is, further, without doubt that the decision of Judge Croake did not afford plaintiffs - or for that matter other candidates such as Wright, the third candidate for International President who was offered no opportunity to send any comparable literature - "similar" distribution in all respects. The timing was different and, consequently, so may have been the impact. Judge Croake's decision, additionally, in no way remedied the violation of section 401(g), i.e., union funds were spent in support of a candidate, or the other violation of section 401(c), i.e., discrimination in the use of lists of members, the latter for the same reason that the timing of the Sheldon mailing was different. The plaintiffs in the action before Judge Croake were not prevented from seeking remedies under 29 U.S.C. §§ 481-483. And the Secretary's burden when bringing this action is not to prove "irreparable" injury as would be required to win an injunction -- all the Secretary must prove is a violation of 481 which "may have affected the outcome" of the election.

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Second Piece of Campaign Literature ("Eleven Pledges")

On November 26, 1971 - shortly after Judge Croake ordered the mailing of Sheldon's literature and in the middle of the election period - the IOMM&P mailed a document to its members entitled, "All Constitutional Amendments and Resolutions of the 60th Convention Ratified-Affiliation of IOMM&P as the International Marine Division, of the ILA (AFL-CIO) Affirmed." (¶ 103 and Exh. FF, Rule 9(g) Statement).

The cost to the IOMM&P of the preparation, duplication and distribution of this document was approximately $2,800.00. (¶ 107, Rule 9(g) Statement). It, like the Newsletter, was distributed by mail to approximately 10,400 members using the computerized list of addresses on file at the International headquarters. (¶ 108, Rule 9(g) Statement).

In all respects, this document too must be considered campaign literature, and, having been prepared and distributed at union expense, it therefore serves as the basis for another 481(g) violation and a 481(c) "discrimination in the use of membership lists" violation.

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While on its face this two page, four sided document purports merely to announce that the membership had affirmed the IOMM&P's affiliation with the International Longshoreman's Association, in fact it was a promotion of O'Callaghan and his team for election purposes especially when viewed in the context of the issues raised in the election of officers and in terms of the timing of the document's distribution.

The Court may examine the totality of circumstances in determining whether a document may constitute campaign literature, see Wirtz v. Independent Workers Union of Florida, 272 F.Supp. 31 (M.D. Fla. 1967); see also, Hodgson v. Liquor Salesmen's Union, Local No. 2, supra; and when it does, in this case it will become apparent that the document in question was indeed campaign literature.

The document is annexed to the Rule 9(g) Statement as Exhibit FF.

Page 3 of this document is entirely dedicated to a letter jointly signed by Teddy Gleason, ILA President and Thomas F. O'Callaghan, IOMM&P President. Therein they boldly pledge their joint effort in eleven areas.* The Teddy Gleason referred to here is the same Teddy Gleason whose remarks had been quoted in the Newsletter

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* The eleven pledges follow on next page:

(-joint eleven pledges-) 1856a

November 26, 1971

TO ALL OFFSHORE, INLAND, PILOT, GOVERNMENT
SHORESIDE MEMBERS OF THE IOMMP — INTERNATIONAL
MARINE DIVISION OF THE ILA

Dear Sirs and Brothers

We pledge our joint effort to:

1 Expand employment opportunities and benefits for Licensed Deck Officers by collective bargaining agreements, and new updated programs of shipping rotation.

2 Insure the primacy of the Masters command position.

3 Protect and extend the traditional authority and status of the Licensed Deck Officer.

4 Establish warranties of job security.

5 Strengthen collective bargaining capability — enforce management — union fair labor standards and practices.

6 Initiate organization campaigns.

7 Unify and stabilize Maritime labor — eliminate waterfront cannibalism and to bring about Maritime labor unity and stability by cooperative trade union action.

8 Act in concert with AFL-CIO, and Maritime unions for progressive legislation.

9 Expose and organize against foreign flag shipping as destructive to fair labor standards, and subversive to the national welfare, within the mainstream of AFL-CIO.

10 Restore the American Merchant Marine to its rightful strength and preeminent leadership.

11 Dedicate ourselves to peace and national security.

Fraternally

Thomas F. O'Callaghan, *President,*
International Organization of Masters,
Mates and Pilots

Teddy Gleason, *President,*
International Longshoremen's Association
Vice President, AFL-CIO

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and which served in part to lead Judge Croake to conclude the Newsletter was campaign material.

What was known to all the members, and what was clearly a campaign issue, was that O'Callaghan had supported the IOMM&P - ILA merger and this document served as an appropriate reminder of this fact and was, accordingly, designed to promote the candidacy of O'Callaghan and his team. The Newsletter, which had been mailed to each member August 19, 1971, brought the message home clearly, as noted supra. Further, O'Callaghan boldly links the two issues right on the face of the secret ballot for the election of officers. Thereon as the last reminder before voting in the last line of his statement under his name, he says: "I request that the membership vote in favor of affiliation with the ILA."

That the Eleven Pledges was campaign material is reinforced by the "Reminder" on the very next page in bold print that December 21 was the deadline for the Election of Officers.

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Shortly after November 9, 1971 Sheldon's material, as permitted by Judge Croake in response to O'Callaghan's Newsletter, was distributed by the AAA. Therein on page 3 Sheldon reinforces his position against the IOMM&P - ILA Merger (¶ 92 and Exh. 00, Rule 9(g) Statement)

One can imagaine the O'Callaghan forces anxiously awaiting the results of the IOMM&P - ILA merger referendum and, assuming the results were positive, spreading that message November 26 with the Eleven Pledges to take one more swipe at Sheldon.

In Hodgson v. United Mine Workers of America, 344 F. Supp. 17, 30-31 (D.C.D.C. 1971) the Court was called upon to determine, inter alia, whether sample ballots spread throughout polling places by partisans of incumbent "Tony" Boyle violated section 481. The

union argued the sample ballot was acceptable as ordinary electioneering material. The court, at page 31, found however:

> The sample ballot per se is not offensive, but its improper usage cannot be condoned. (emphasis supplied).

Even had the Eleven Pledges sent by the IOMM&P been as seemingly innocuous as the sample ballot spread by the United Mine Workers, there is no doubt that it too was used as campaign literature. It was funded by the IOMM&P and distributed using the union's list of members. Accordingly, these facts constitute violations of sections 401(g) and (c) of the Act, 29 U.S.C. §§481(g) and (c).

In context, it is also clear that said violations may have affected the outcome of the election.

The O'Callaghan margin of victory was 410. It follows therefore that his election "may have been affected" by the "Eleven Pledges". How the 684 members who voted after the mailing of the Eleven Pledges may have voted without said mailing is an imponderable. In view of the standard that must be met by the IOMM&P, no one can say the Eleven Pledges did not affect the outcome of the election.

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Caldwell's margin of victory was 756 and Lowen's was 834 over their closest opponent.* As part of the O'Callaghan team they too may have benefited from the IOMM&P funding and distribution of the Eleven Pledges. Their elections must likewise be voided and, together with the elections for Offshore Divisions (see footnote on pages 45-46, supra) offices, must be re-run under the supervision of the Secretary.

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* There need be only one-half plus one of the total comprising the margin of victory who may have voted for the runner-up to reverse the results. The IOMM&P will never be able to present tangible evidence to prove 418 of those voting for Lowen, for example, would not have voted for runner-up Norstrand, thereby making Norstrand the winner.

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POINT III

MEMBERS OF THE OFFSHORE DIVISION IN VIOLATION OF 29 U.S.C. § 481(e) WERE DENIED A REASONABLE OPPORTUNITY TO NOMINATE, DENIED THE RIGHT TO BE A CANDIDATE FOR AND HOLD THE OFFICE OF, AND DENIED THE RIGHT TO VOTE FOR OR OTHERWISE SUPPORT THE CANDIDATE(S) FOR THE OFFICE OF OFF-SHORE DIVISION - VICE PRESIDENT (ATLANTIC) AND OFFSHORE DIVISION - VICE PRESIDENT (GULF)

The discussion that follows concerns the scheme by which Vice Presidents were elected in 1971 for the Offshore Division and demonstrates why the elections for two of those positions - Offshore Division -Vice President (Atlantic) and Offshore Division-Vice President (Gulf) - were illegal and, together with the provisions of the Constitution and Offshore Division By Laws which permitted such election, must be declared void.

Pursuant to Section 401(e) of the LMRDA, 29 U.S.C. §481(e), "...a reasonable opportunity shall be given for the nomination of the candidates and every member in good standing shall be eligible to be a candidate and to hold office(subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the

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right to vote for or otherwise support the candidate or candidates of his choice..."*

Provisions of the International Constitution and the Offshore Division By-Laws did not allow for a direct vote by Offshore Division members for Offshore Division Vice-Presidential positions. Rather, they provided that members elected in the 1971 election of Port Agents for the Port of New York and the Port of Galveston automatically ascended to the positions of Vice-President (Atlantic) and Vice-President (Gulf), respectively.** And only members of the Port of New York and the Ports of Galveston-Houston-Port Arthur could (and did), nominate, be candidates for, and vote for Port Agent of New York and Port Agent of Galveston, respectively.***

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* Section 504, 29 U.S.C. § 504, referred to herein makes members of the Communist Party and persons convicted of certain crimes ineligible to hold union office and is not relevant for the purposes of this motion.

** See ¶ 144, Rule 9(g) Statement; also Art. XIX, Sec. 2(i) Offshore Division By-Laws, Exh. B. Rule 9(g) Statement.

As explained on pages 26 - 27 in the FACTS, supra, the scheme was not the same for the Vice-President (Pacific) position. Inasmuch as all members in the Pacific area were members of one Local (Local 90) they all participated in the selection of the Vice-President (Pacific). The Government does not contest that position with respect to these 481(e) violations.

*** See ¶ 115, Rule 9(g) Statement; also Art. XIX, Secs. 2(c), (d) and (e) Offshore Division By-Laws, Exh. B, Rule 9(g) Statement.

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The remaining members in the various Atlantic area former Locals - Local 5 (Port of Providence), Local 11 (Port of Boston) and Local 14, (Ports of Baltimore, Philadelphia, Norfolk, Charlestown and Savannah) were not eligible to nominate, be candidates for, vote for, or for that matter, hold the office of or support the candidate(s) of their choice for Port Agent of New York and therefore had no say whatsoever in determining who would become Offshore Division Vice President (Atlantic).

Similarly, the remaining members in the various Gulf area former Locals - Local 4 Ports of Mobile and Tampa), Local 24 (Ports of Jacksonville and Hollywood) and Local 15, (Port of New Orleans) - were denied these rights with respect to the office of Port Agent of Galveston. Accordingly they had no voice whatsoever in determining who would become Offshore Division-Vice President (Gulf).

This arrangement flies in the face of union democracy. It segregates certain members from the Offshore Division and denied them the

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opportunity to select two of the most important members of the Offshore Division leadership.

The Importance Of Offshore Division Vice Presidents

As noted in Article VI Section 4 of the Offshore Division By-Laws, Vice Presidents "coordinate the activities of the Port Agents, Executive Assistant Port Agents, and Assistant Port Agents under their direction..." They take appropriate action to assure members are informed of Union affairs, that vessels are properly manned, that disputes are settled and that collective bargaining agreements are effectively and uniformly enforced. In the absence of the International Officers, who also serve in the dual capacity as the three top officers of the Offshore Division, the Offshore Division Vice Presidents have authority to sign checks and carry out certain other duties (Art. VI, Sec. 3, Offshore Division By-Laws). And pursuant to Article VI, Sec. 5 of the Offshore Division By-Laws they, the Offshore Division Vice Presidents, have authority to require the performance of duties of the Port Agents, Executive Port Agents and Assistant Port Agents for their areas in addition to those duties otherwise provided for said subordinates.

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As provided in Article V, Section 2 of the International Constitution these Vice-Presidents are members of the International' General Executive Board together with the three International officers; and in weighted fashion based on membership, these Vice Presidents, pursuant to Article VII, Section 1 of the IOMM&P Constitution, cast votes on matters that come before the General Executive Board.

Undemocratic Nature of This Scheme

Congress' "model of democratic [union] elections was political elections in this country,..." Wirtz v. Hotel, Motel & Club Employees, Local 6, 391 U.S., supra, at p. 504. The structure provided by the IOMM&P for the Offshore Division Vice Presidents (Atlantic) and (Gulf) is equivalent to permitting the people in the City of New York to select, in every phase of the election process, the United States Senator for all the people in the State of New York. The remaining people in the State may very well enjoy benefits from said United States Senator's representation in Congress and may be satisfied in many respects, but in fact they would be disenfranchised and have had no opportunity to assert their rights as guaranteed by the United States Constitution. Further

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they may have had another candidate they wished to support, and for whom to vote and should never be denied these basic opportunities and rights.

The Atlantic Port members, other than those in the Port of New York, and the Gulf Port members, other than those in the Port of Galveston, were similarly disenfranchised in all respects in connection with the selection of Offshore Division Vice President (Atlantic) and Offshore Division Vice President (Gulf), respectively. Nothing could be further from "democratic principles" than this.

Section 481(e) requires that "every member in good standing" of the Atlantic Offshore and Gulf Offshore areas "shall be eligible to be a candidate and hold office ... and shall have the right to vote ..." Here, obviously, these rights have been denied to large segments of the Offshore Divisions.

Section 481(e) also requires a "reasonable opportunity shall be given for the nomination of candidates..." It can hardly be argued a reasonable opportunity was given when no opportunity was given at all - directly or indirectly - for the nomination of Vice Presidential candidates to the outcast members of Atlantic and Gulf Offshore Division Ports (those not in New York and Galveston).

In Wirtz v. National Maritime Union of America, 284 F.Supp. 47,60 (S.D.N.Y.), aff'd, 399 F.2d 544 (1968), this Court held that a union procedure requiring only anti-incumbent candidates, as distinguished from the incumbents (the "Administration Slate"), to nominate themselves was "violative of 29 U.S.C. §481(e) in that they denied members a reasonable opportunity to nominate and support candidates of their own choosing." The discriminatory character of the provisions considered in the instant case are even worse. They dissallow anyone from nominating and supporting any member for the Offshore Division Vice President (Atlantic) and (Gulf) positions unless the member to be nominated is a member of the Port of New York or the Ports of Galveston-Houston-Port Arthur, respectively, and is nominated by a member in said Ports.

Nor were the members of the outcast Ports eligible to be candidates for or hold the office of Vice President (Atlantic) and (Gulf), subject to reasonable qualificatiens uniformly imposed, or given the right to vote for or support candidates of their choice, as section 481(e) otherwise insists.

While the law permits reasonable qualifications to be imposed on those running for office,

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it is no "qualification" at all, let alone a "reasonable" one, to restrict one entirely from ever being eligible to be a candidate for or to hold a particular office. That is precisely what was done for the two subject Vice-Presidential positions in the 1971 election. There has been a wholesale denial of 481(e) rights.

The Supreme Court in Wirtz v. Hotel, Motel & Club Employees U., Local 6, 391 U. S. 492 (1968), holding a by-law restriction, wherein 93% of the union members were ineligible to run for office, not to be a "reasonable qualification", re-affirmed the Congressional purpose of Title IV of the LMRDA in noting the "need to protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self government and, through the election process, to keep the union leadership responsive to the membership." 391 U. S. at 497.

The outcast members of the Offshore Division's Atlantic and Gulf Ports were denied the opportunity to participate fully in the democratic self governing of their union. The absolute denial

of rights to members merely because their memberships were in Providence, Boston, Baltimore, Philadelphia, Norfolk, Charleston, Savannah, Mobile, Tampa, Jacksonville, Hollywood and New Orleans (rather than New York, and Galveston - Houston - Port Arthur) is certainly not a "reasonable qualification," and, inasmuch as some members (those in the Ports of New York and Galveston) were given all the rights, it is certainly not a reasonable qualification "uniformly imposed," as Section 481(e) requires.

The Sixth Circuit in Hodgson v. Local Unions No. 18, Int. U. of Operating Eng., 440 F.2d 485 (6th Cir.), cert. denied, 404 U.S. 852 (1971), considered the question of "reasonable qualifications" in a case where a constitutional provision allowed only members of a parent local, to the exclusion of those in three sub-locals, to hold union office. The Court held this provision to be "manifestly unreasonable." It had "no bearing on the fitness of sub-local members to hold union office." Finding the provision to be inconsistent with the intent of 29 U.S.C. § 481(e), and noting that the LMRDA was modeled on political elections in our country, the Court stated:

> "A requirement that all candidates for union office be members of a particular subdivision of the union has no parallel in our system of political election." (at 488; emphasis supplied).

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The instant case concerning the Offshore Division Vice Presidents is similar in all respects to the Local Unions No. 18 case above. The Offshore Division By-Laws provision limiting those who may hold Vice Presidential (Atlantic) and (Gulf) office to the members of the Ports of New York and Galveston is "manifestly unreasonable" and it, together with the election to those Vice Presidential offices, must be declared violative of 29 U.S.C. §481(e).

If provisions such as the Offshore Division By-Laws were to remain effective, the members chosen Vice President (Atlantic) and Vice President (Gulf) would have little need to be responsive to Offshore Division members outside the Ports of New York and Galveston, respectively.*

* The scheme set forth by the Offshore Division By-Laws to enable only the members of the Ports of New York and Galveston - Houston - Port Arthur to become Vice Presidents (Atlantic) and (Gulf) respectively was to be applied to the 1971 election only. (Art. XIX, Sec. 2(i) Offshore Division By-Laws). Apparently all members of the Offshore Division are eligible to vote for all Offshore Division Vice Presidents and otherwise participate in the election process in the present election. This can have no bearing on the instant action, however. Subsequent elections do not moot a pending case. See Point VI, infra. The Court must examine only the facts as they may have transpired for the election in question and, if found to have violated the law in such manner as they "may have affected the outcome of the election" in question, order a new election - notwithstanding an intervening election - subject to the supervision of the Secretary of Labor. The incumbents have had distinct advantage as a result of their incumbency; the Secretary in the "public interest" (Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463, 475 (1968)) is entitled to a new supervised election.

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Clearly, denying the outcast Port members the right to participate in the selection of their own Vice Presidents "may have affected the outcome of the election" for these positions. One could never prove other candidates would not have surfaced and been elected had they at least had the opportunity to be nominated and to hold office. The IOMM&P cannot prove the restrictions respecting the Offshore Division Vice Presidents did not affect the outcome of the election.

The Supreme Court in Hotel, Motel Employees 391 U.S., supra, at 508, commented with respect to an unreasonable qualification on candidacy:

> "... it is impossible to know that the election would not have attracted many more candidates but for the by-law."

The election with respect to the offices of Offshore Division - Vice President (Atlantic) and Offshore Division-Vice President (Gulf), together with those By-Law provisions permitting such a structure, should be declared void. A new election therefore entitling all members of the Division to participate in a democractic fashion in the selection of said officers is required.

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POINT IV

IN VIOLATION OF SECTION 481(e), THE 1971 ELECTION OF OFFICERS WAS NOT CONDUCTED IN ACCORDANCE WITH THE INTERNATIONAL CONSTITUTION AND OFFSHORE DIVISION BY-LAWS

The last sentence of Section 401(e) of the LMRDA, 29 U.S.C. § 481(e) provides:

> The election shall be conducted in accordance with the constitution and by-laws of such organization insofar as they are not inconsistent with the provisions of this subchapter [referring to Title IV of the LMRDA-Elections].

In two respects the defendant IOMM&P violated this statutory command. First, the IOMM&P did not adhere to Article V, Section 8(d) of the International Constitution requiring all election ballots to be mailed not later than the thirtieth day following the close of the nominating period. Second, members of Local 88 (Port of New York) were denied their right to a copy of the Local 88 mailing list otherwise authorized by Article XIX, Section 2(b) of the Offshore Division By-Laws and Article V, Section 5 of the By-Laws of former Local 88.

Inasmuch as these two violations "may have affected the outcome of the election,"* the election

* The violations with which this point is concerned are clearly established. The IOMM&P cannot prove they did not affect the outcome of the elections.

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must be voided and a new one ordered subject to the supervision of the Secretary of Labor.

BALLOTS NOT SENT OUT ON TIME

Article V, Section 8(d) of the International Constitution states in pertinent part:

> "All ballots shall be mailed not later than the thirtieth day following the close of the nominating period at which nominations have been made."

Nominations for the three International Officers ended July 28, 1971 (¶ 121 Rule 9(g) Statement).

Nominations for the officers of the Offshore and Pilots Divisions ended by that date as well (¶¶ 122 and 123, Rule 9(g) Statement). Elections for the officers of these divisions were to be and were held simultaneously with the election of International Officers (¶ 26, Rule 9(g) Statement).

Ballots for the elections of International Officers and Offshore Division officers were mailed September 21, 1971. (¶ 125, Rule 9(g) Statement). All members in good standing were entitled to vote for International Officers. Members in good standing of the Offshore and Pilots Divisions were entitled to vote for their respective port officers, inter alia.*

* Division members were also entitled to vote for delegates to the next IOMM&P convention. See the sample ballots annexed as Exhibits D-1 - D-9, Rule 9(g) Statute.

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Thirty days from the end of the nomination period would have been August 27, 1971. Inasmuch as the ballots were not mailed until September 21, 1971, the IOMM&P violated its own Constitution and thereby violated Section 401(e) of the LMRDA, 29 U.S.C. § 481(e).

We have previously noted (POINT I), that once a violation of Section 481 has been established, a prima facie case is made out that said violation, for the purposes of 29 U.S.C. § 482(c), "may have affected the outcome of the election." Accordingly, defendant union then has the burden of proving said violation did not affect the outcome of the election.

It cannot be shown by defendant that the delay in sending out the ballots did not affect the outcome of the election. Indeed actions taken by the IOMM&P just prior to and during the period of delay suggest strongly that the delay may very well have affected the outcome of the election.

During this interim period, the IOMM&P distributed its magazine "Master, Mates and Pilot" (¶¶ 126-129, Rule 9(g) Statement). Said Magazine is annexed to the Rule 9(g) Statement as Exhibit GG. Therein, among other things the IOMM&P further propagandizes the activities of the incumbant officers and

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one can conclude only that this magazine may have some influence on the members' votes.

The magazine itself is rife with items and articles promoting the "wonderful" work of incumbents O'Callaghan, Caldwell and Lowen, as well as certain other incumbents. See, for example, the lead article on page 3 picturing Caldwell and Lowen with Congressman Garmatz; the feature on Lowen on page 13; the activities planned by incumbent Larson, Executive Assistant Port Agent, San Francisco, as noted on page 14; a letter to the editor from Caldwell on page 19; Lowen's statement before a Congressional committee on page 20; and the statement of incumbent Jones, Port Agent Galveston (and hence Vice-President (Gulf)) on page 30.

What is perhaps even more influential are the articles concerning the IOMM&P-ILA Affiliation. Coming on the heals of the "Newsletter" which excoriated Sheldon over this issue, the magazine must be read to reinforce and highlight the importance of this campaign issue. The note,for example Congressman Garmatz's statement concerning affiliation on page 28; the picture of O'Callaghan and "Teddy" Gleason and the Gleason and Bower's statements on page 29; the "Affiliation Chronology" on page 35; and the praiseworthy article "All About Teddy" on page 37.

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The magazine was before Judge Croake also. He determined that it was not "campaign literature".* Notwithstanding his decision, the magazine had to be at least somewhat influencial. What makes this even more likely is the fact that this impressive glossy magazine form of the "official journal" of the IOMM&P (see O' Callaghan Deposition, page 69; Act. VI, sec 1 (L) (IOMM&P) Const.) appears only to have been published twice. It is more than peculiar that one of those publications was distributed at a time when the distribution of the ballots were delayed. And none was published after this one (see Addendum to O'Callaghan Deposition in response to question on p. 70)

One is free to speculate concerning the myriad of ways it was "reasonably probable" the delay in mailing the ballots "may have affected the outcome of the election." Of the 10,500 members of the union only 5716 ballots were counted. No one can tell how a great many of those who voted would have voted a month before they did; nor is it possible to tell how many eligible members who did't vote would have voted had they received their ballots on time, and just how they would have voted. The question of who or how many members would have voted earlier is further

* The Secretary of Labor was not a party to that action accordingly he is not bound by that decision. While we believe this magazine does constitute "campaign literature" financed and distributed by the IOMM&P, we do not press that issue in this motion. It is reserved in the event a trial is necessary.

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complicated by the fact that the members are at sea for various lengths of time and at various times. Events over a period of time shape the course of and the outcome of an election. IOMM&P events or even national and international events closest in time to the election often have the most influence. Just what transpired during the period of delay to influence the minds of the members to vote, not to vote or how to vote is an imponderable. In view of the fact that the IOMM&P can never prove said delay did not have an affect on the outcome of the election, this violation must cause the whole election to be voided.

Failure to Provide Local 88 List

Article XIX, Section 2(b) of the Offshore Division By-Laws provides:

> b. Except as specifically provided by Convention action and membership referendum, the existing election procedures of the respective Offshore Locals in effect as of October 1, 1970, shall be followed. (¶ 133 and Exh. B, Rule 9(g) Statement).

The By-Laws of former Local 88 (now the Port of New York) in effect as of October 1, 1970, provided in Article V, Section 5 in pertinent part:

> A certified list of all members of Local 88 shall be made available at cost to all candidates, provided, however, that any postage charges shall not be billed to this Organization (¶¶ 135 and 136, and Exh. HH, Rule 9(g) Statement.)*

* No "convention action and membership referendum" ever repudiated this requirement.

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A number of candidates for office in the Port of New York, all members of former Local 88, had requested and were denied copies of said list of members.* One of them (Soto) joined with Sheldon and another and instituted the previously mentioned action before Judge Croake (See POINT II, supra, regarding the Newsletter; ¶ 138 and Exh. CC, Rule 9(g) Statement) and thereupon the determination of the legality of the refusal to provide a Local 88 mailing list was litigated.

Judge Croake found that the fact the IOMM&P refused to provide the requested Local 88 membership list displayed "a violation of the spirit of the LMRDA as well as the letter of that law." Sheldon v. O'Callaghan, 335 F. Supp. supra, at 329. Citing that provision of Section 481(e) requiring a union to conform with its own constitution and by-laws and finding the IOMM&P to have discriminated against a candidate with respect to the use of lists of members as proscribed in Section 481(c), Judge Croake directed the IOMM&P and O'Callaghan to "make the mailing lists available

* The first part of Exhibit F to the Requests for Admissions (August 30, 1971 - 2:00 p.m. transcript of proceeding before the International Ballot Committee), which was admitted to be a true copy in Admission #16 notes the many candidates either individually or through attorney Burton H. Hall, who requested a copy of said list. See pages 19, 20 and 21 thereof.

to candidates for election to office in former Local 88." (At 329).

Subsequent to Judge Croak's decision dated October 18, 1971, embodied in his Order of November 4, 1971, (EXHs. CC and DD, Rule 9(g) Statement) the IOMM&P and O'Callaghan moved to reargue the case with respect to that portion of the order directing the IOMM&P and O'Callaghan to provide the Local 88 membership list (¶ 141, Rule 9(g) Statement). The IOMM&P argued that there were insufficient facts before the court to decide this issue and that the IOMM&P would present evidence to show "plaintiff is not entitled to the relief he seeks" noting that an arbitrator in connection with a 1967 local 88 election had denied a similar request for lists.

Judge Croake on November 15, 1971, denied by endorsement order the motion to reargue. (§ 142 and Exh. II, Rule 9(g) Statement).

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Appeals to the Second Circuit were dismissed by stipulation so ordered by the Clerk of that Court. (¶¶ 144-146 and Exh. JJ, Rule 9(g) Statement).

It follows, therefore, as it did with the Newsletter discussed in POINT II, supra, that the IOMM&P was a party to that case in which identical issues there are before this Court. The refusal of the IOMM&P to provide certified copies of the Local 88 Membership lists was a violation of sections 481(c) and (e) and that must be the finding herein.*

Violations having been established, it need only be shown that said violations may have affected the outcome of the election. The burden now resting on the IOMM&P, it is virtually impossible for it to prove

* Section 481(e) - failure to comply with own constitution and by-laws.
Section 481(c) - discrimination with respect to the use of lists.

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said violations did not affect the outcome of the election.

It is hardly arguable that a membership list may provide a candidate for office with valuable resources in terms of soliciting campaign assistance and funds. Further, it may offer an opportunity to distribute campaign material more conveniently and inexpensively than the method dictated by the incumbents (through the AAA). It is certainly more economical to type one's own envelopes and more convenient to do so on one's own time (See O'Callaghan Deposition, p. 282). In this case the IOMM&P required members wishing to inspect official up-to-date membership lists to do so at AAA headquarters in New York City. (See O'Callaghan Deposition, page 254).

Inspection at the AAA was actually limited to "viewing" the appropriate lists; copies could not be made. (See O'Callaghan Deposition, pp. 254-255; Lowen Deposition, p. 200).

There is no doubt that those candidates in possession of a copy of the Local 88 list may have been able to use it in some way to their benefit.

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A Court is free to speculate as to the ways it is "reasonably probable" a violation "may have affected the outcome" of an election. Once a violation is proved the only question to ask is whether the defendant union can prove the violation did not affect the outcome of the election.

Here, this list could not only have been used by and for the benefit of the candidates for office in the Port of New York (former Local 88), it may very well have been used by and benefited all those with whom the candidates requesting the Local 88 list were identified (See, e.g., O'Callaghan Deposition, p. 282). Soto a named plaintiff in the case before Judge Croake, for example, was associated with Sheldon and his slate known as the Members for a Democratic Union ("MDU")(¶ 59 and Exs. MM, Rule 9(g) Statement). The spin-off benefits to the others in the MDU and indeed to any other candidate opposed to O'Callaghan and his slate are obvious. There was no prohibition to the sharing of said list and any with a copy was free to use it in his campaign. Further to the extent literature may have been circulated by Soto and the others in Local 88 it may very well have had tangential benefits to those seeking Local 88 votes

namely the insurgent candidates for International Offices.* In view of the shifted burden of proof, the IOMM&P cannot prove this would have been otherwise.**

Accordingly as a result of this violation of the Offshore Division and Local 88 By-Laws such that it may have affected the outcome of the election, the Government submits the election of International Officers and Offshore Division officers must be voided.

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* We cite for example literature distributed by C. Hemming, a candidate for Port Agent of New York, wherein he supports Sheldon, Koonce and Norstrand and the MDU program. See Exh. MM, Rule 9(g) Statement.

** The Government is informed that the Local 88 list was in fact never provided to Soto and other Local 88 insurgent candidates in time to be of any use in the election. Whether that is established fact is not important, however, for it is clear no list was provided at least until November 15, 1971, the date of Judge Croake's order, and by then more than 4200 ballots had been cast (see Exh. N, Rule 9(g) Statement).

POINT V

JURISDICTIONAL PREREQUISITES TO BRINGING THIS ACTION HAVE BEEN MET IN ALL RESPECTS

Section 402(a) of the LMRDA, 29 U.S.C. §482(a), states in pertinent part:

> "(a) A member of a labor organization -
>
> 1. who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or
> 2. who has invokved such available remedies without obtaining a final decision within three calendar months after their invocation, .
>
> may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers).

There were 16 members in good standing who complained to the union about various aspects of the conduct of the 1971 election (¶ ¶ 70 and 72, Rule 9(g) Statement). As admitted by defendant these complainants individually and by their attorney properly exhausted all the internal union remedies available to them as is initially required by Section 482(a) (¶ 71, Rule 9(g) Statement). Defendant takes issue, however, with the second requirement in 482(a)(2), namely that the complainants failed to file a complaint with the Secretary of Labor within one calendar month from the time they were notified that their internal union appeals had been finally denied.*

* Affirmative Defense in Answer and Answer # 35 in Response to Plaintiff's First Set of Interrogatories.

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As is clear from the exchange of correspondence between the complainants, by their attorney, Burton Hall, and Captain Robert Lowen, the Secretary Treasurer of the IOMM&P, the complaint filed with the Secretary of Labor on March 29, 1972 was timely.

The balloting was conducted over the three month period September 21, 1971 to December 21, 1971. In his January 5, 1972 letter, Burton Hall, reaffirming the complainants protests of the conduct of the election, requested of Captain Lowen the International Secretary Treasurer advise with respect to internal union appellate remedies:

> In regard to all the above appeals, and on behalf of all the persons named above, I request that you advise me promptly as to any and all appellate remedies available to me and/or to any of the above-named persons, within either the IOMM&P or its Offshore Division. I likewise request that you promptly advise me of any procedural or other error committed by me or by any of the above in the submission of any such protest, challenge or appeal, and of any remedy that still remains to me and/or to any of the above-named. (See ¶ 72 and Exh. T, Rule 9(g) Statement)

In response Captain Lowen on January 7,, 1972 wrote to Burton Hall as follows:

> With reference to your letter of January 5, 1972, addressed to the International Ballot Committee on behalf of your clients, Bros. Sheldon, Koonce, Norstrand, Hemming, Soto and Nereaux, please be advised that the International Constitution requires all appeals from the rulings of the International Ballot Committee to be made to the General Executive Board, which will meet very shortly.

> You will be advised of the exact time and place just as soon as the various accommodations and arrangements can be made. (See ¶ 73 and Exh. W, Rule 9(g) Statement)

Pursuant to that letter, Burton Hall on January 19, 1972, on behalf of sixteen dissident union members, wrote to the General Executive Board of the International. Therein the dissident union members complaints were spelled out.* (See ¶ 74 and Exh X, Rule 9(g) Statement)

The General Executive Board met on January 25 and 26, 1972 and considered appeals to the conduct of the election.

It was not until February 29, 1972 that the IOMM&P through Captain Lowen, wrote to Burton Hall to advise him that the complainants' appeals had been denied. In his undated letter postmarked February 29, 1972 (See ¶ 75 and Exh. Y, Rule 9(g) Statement) Captain Lowen advised Burton Hall as follows:

> "In response to your letter of January 5th, following are excerpts from the minutes of the IOMM&P General Executive Board meeting of January 25 and 26, 1972, held in San Diego, California:" (emphasis added)

The last line of the excerpt taken from the minutes of the meeting on January 26, 1972, as noted in Captain Lowen's letter, read:

> "After careful consideration of all the challenges and the various documents, it was moved, seconded and carried that the appeals be denied."

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* Again Burton Hall requested advice respecting any other appellate procedures.

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Burton Hall received the February 29, 1972 letter on March 2, 1971. (See ¶ 76(b) and Exh. Z, Rule 9(g) Statement). Hall filed a complaint, on behalf of the members he represented, with the Secretary of Labor, on March 29, 1972.

Defendant allegations as noted in Answer #35 to Plaintiff's Interrogatories is that "The complainants knew that the General Executive Board was meeting on January 25 and 26, to take up the appeal. The denial of the appeal was made on January 26, 1972."

This cute allegation, of course, omits any allegation that Hall was in fact notified that there was a denial of the appeal. Even if Hall had some informal knowledge that there might have been a denial, that could hardly be considered a final, formal, official notice of the denial on which he could base a complaint to the Secretary.

Captain Lowen's letter of February 29, 1972 was the first time complainants were made aware in writing that their appeals had been denied. Until that time no notice of the denial was officially communicated to Burton Hall. Accordingly the complaining union members had until March 29, 1972 to file with the Secretary, which they did.*

The Secretary of Labor investigated the dissendent members complaint, as required by 29 U.S.C. § 482(b), and found probable cause to believe that violations of Section 481 had occurred and had not been remedied.

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* See ¶ 78 and Exh. Z, Rule 9(g) Statement.

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The Secretary's determination of probable cause is conclusive. Wirtz v. American Guild of Variety Artists, 267 F. Supp. 527, 534 (S.D.N.Y. 1967); Wirtz v. Local 30, International Union of Operating Engineers, 34 F.R.D. 13, 14 (S.D.N.Y. 1963); neither that determination nor the Secretary's investigation can be questioned.

Thereupon, the Secretary, through the United States Attorney for the Southern District of New York, brought this action on November 28, 1972. Attorney for the IOMM&P by waiver* had agreed to extend the Government's time to file until December 28, 1972 (¶ 80 and Exh. AA, Rule 9(g) Statement).

The IOMM&P, with respect to this action, is a labor organization as defined in 29 U.S.C. §482(i) and (i) and thereby, as admitted, with respect to the conduct of its election of officers was required to adhere to the provisions of 29 U.S.C. §481 (¶ 5, Rule 9(g) Statement). While this motion concentrates on only a few ways in which the IOMM&P viclated the provisions of Section 481, the IOMM&P did volate Section 481 in many ways the Government alleged, and each violation may have affected the outcome of the election. Accordingly the Secretary brought this action pursuant to Section 482.

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* See ¶ 80 and Exh. AA, Rule 9(g) Statement.

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POINT VI

THE PRESENT ONGOING ELECTION OF IOMM&P OFFICERS WILL NOT MOOT THE INSTANT ACTION

Once the Court finds a violation of Section 481 may have affected the outcome of the election in question it, "shall declare the election, if any, to be void and direct the conduct of a new election under the supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and by-laws of the labor organization." 29 U.S.C. § 482(c).

The preparation and mailing of the Newsletter by the IOMM&P caused the defendant union to violate 29 U.S.C. §§ 481(g) and (c); and it is clear the violations may have affected the outcome of the elections the Government challenges herein.

Accordingly, if for no other reason than because of the violations caused by the Newsletter, the Court must declare the election for International offices and for Offshore Division Port offices void and direct the conduct of new elections. See POINT II, supra.

The fact that the IOMM&P is now conducting another election for officers* must not and should not deprive the

* Ballots for the present election of officers went out on or about September 24, 1974 and must be received back on or about December 24, 1974.

secretary from having the Court impose such a new election on the IOMM&P. Wirtz v. Local 153, Glass Bottle Blowers Ass'n., 389 U.S. 463, 473-474 (1968). In that case the Supreme Court noted:

> Congress deliberately gave exclusive enforcement authority for the Secretary, having "decided to utilize the special knowledge and discretion of the Secretary of labor in order best to serve the public interest" . . . . And Congress unequivocally declared that once the Secretary establishes in court that a violation of § 401 may have affected the outcome of the challenged election, "the court shall declare the election * * * to be void and direct the conduct of a new election order supervision of the Secretary * * *." 29 U.S.C. § 482(c). (Emphasis supplied.)
>
> We cannot agree that this statutory scheme is satisfied by the happenstance intervention of an unsupervised election. The notion that the unlawfulness effecting the challenged election should be considered as washed away by the following election disregards Congress' evident conclusion that only a supervised election could offer assurance that the officers who achieved office as beneficiaries of violations of the Act would not be some means perpetuate their unlawful control in the succeeding election.
>
> * * *
>
> Congress chose the alternative of a supervised election as the remedy for a § 401 violation in the belief that the protective presence of a neutral Secretary of Labor would best prevent the unfairness in the first election from infecting, directly or indirectly,

> the remedial election. The choice also reflects a conclusion that union members made aware of unlawful practices could not adequately protect their own interests through an unsupervised election. It is clear, therefore, that the intervention of an election in which the outcome might be as much a product of unlawful circumstances as the challenged election cannot bring the Secretary's action to a halt. Aborting the exclusive statutory remedy would immunize a proved violation from further attack and leave unvindicated the interests protected by § 401. Title IV was not intended to be so readily frustrated.

Should the present on-going election be concluded prior to the determination of this action, it, too, must be rendered null and void if the Secretary is successful herein. If for no other reason than that the Newsletter so tainted the 1971 election of officers, said election as well as any intervening election, must be declared void and a new election ordered.

In the present motion we ask the Court to examine, as well, a number of the other violations the IOMM&P commited and we submit these, too, require the voiding of the 1971 election and the ordering of a new election.

The Eleven Pledges is clearly campaign literature. Having been prepared and mailed by the IOMM&P, Sections 481(g) and (c) violations have been established. How it

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may have affected the outcome of the election has been demonstrated (POINT II, supra.). As a result of the violations caused by this document, the Government submits that the election for International offices, and indeed for all the Offshore Division offices, must be voided.

By restricting the membership of the Offshore Division Ports, other than those for New York and Galveston, from participating in the selection of the Offshore Division Vice Presidents (Atlantic) and (Gulf), said elections must be voided. Although the present election with respect to Offshore Division Vice Presidents -- is being conducted pursuant to by-law provisions attempting to rectify the illegal provisions,* that does not deny the Secretary his right to a court ordered election under his supervision. Following the logic of the Supreme Court in Local 153, Glass Bottle Blowers Ass'n., supra, the Ninth Circuit in Hodgson v. Local 400, Bakery and Confectionary W.I.U., 491 F.2d 1348, 1352-53 (9th Cir. 1974) reasoned:

> The longer the supervised election was delayed, the more likely it would be that those who had gained office through the tainted election would become entrenched and difficult to

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* Apparently in the present election all members of the Offshore Division are entitled to nominate, be candidates for, support and vote for all the Vice Presidential positions.

> unseat. Moreover, a defiant union could avoid ever submitting to a supervised election by repeatedly holding unsupervised "remedial" elections after internal remedies were exhausted on each previous election but before an action was filed.
>
> Because of this potential for delay and obstruction, the interpretation suggested by the union would seriously weaken the bargaining power of the Secretary and thus impede the attainment of two congressional objectives. Congress expressed a preference for an election supervised by the Secretary as the remedy for section 401 violations, believing that "only a supervised election could offer assurance that the officers who achieved office as beneficiaries of violations of the Act would not by some means perpetuate their unlawful control." Bottle Blowers, supra, 389 U.S. at 474, 88 S.Ct. at 650. And Congress hoped to achieve a maximum of voluntary compliance, the objective being "not a lawsuit but . . . 'aid in bringing about a settlement through discussions before resort to the courts.'" Bottle Blowers, supra, at 472, 88 S.Ct. at 649, citing Calhoon v. Harvey, 379 U.S. 134, 140, 85 S.Ct. 292, 13 L.Ed.2d 190 (1964). If a union could defeat the Secretary's cause of action by unilaterally undertaking an unsupervised election after the Secretary found probable cause, the union would have little reason to engage in settlement discussions with the Secretary, and even less to agree to a supervised election.

The failure of the IOMM&P to adhere to its own constitution and (Offshore Division) by-laws as described in Point IV, supra, violate 29 U.S.C. § 481(e). The defend-

ant is unable to prove these violations did not affect the outcome of the elections in question, and, in fact, there is a reasonable possibility that the contrary is true. The delay in getting out the ballots may have affected the outcome of every election for International Office and Offshore Division Port Office (except those wherein the candidate was unoppossed), elections for all, nonetheless, should be ordered as a result.

The failure to provide a Local 88 list of members to Soto and others not only may have affected the outcome of the Port of New York races, but because Soto was part of the Sheldon state -- and the list of members could have been used nationwide -- all the elections for International Office and for Offshore Division Port Offices (except, those wherein the candidates were unopposed) may have been affected. For the violations caused by the failure to provide the Local 88 list of members, all elections must be voided and new elections held under the supervision of the Secretary.

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POINT VII

SUMMARY

The violations discussed in POINTS II, III and IV, supra, are among many IOMM&P committed during the conduct of its 1971 election of officers.* We submit this summary judgment motion with respect to these few in our effort to conclude this case without the necessity of further exhaustive discovery and a very lengthy belabored trial.

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* In addition to the violations discussed in POINTS II, III and IV, supra, the Government believes there are many other ways in which the IOMM&P violated section 481. Included among them are the following:

1. By operation of the IOMM&P Constitution and Offshore Division By-Laws, the three International officers automatically - without any election whatsoever - become the top three officers of the Offshore Division. Inasmuch as the Offshore Division performs vital function on behalf of its membership alone, the members should have been entitled at least to select their own officers.

2. During the course of the 1971 election all 600 (approx.) members of Inland Local 47 were denied the right to vote in the International elections.

3. Members were forced to come to AAA offices in New York to inspect membership lists rather than, as O'Callaghan had originally announced, have access to said lists in local ports.

4. Members were forced to distribute their campaign literature through the AAA in New York rather than, as had previously been announced, being permitted to mail through local mailing services.

There may be others as well, all of which, would be raised at trial. Should this motion be denied we would then procede with discovery in preparation for a trial on all issues.

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In the recent case, Brennan v. Local V. No. 639, Int. Bro. of Teamsters, etc., supra, the District of Columbia Court of Appeals discussed fully the propriety of summary judgment. Therein it was concluded that summary judgment in Title IV cases such as these was entirely appropriate. That Court affirmed the District Court's finding that certain 481(e) violations had been committed necessitating a new election. The Court of Appeals, concerning summary judgment, concluded:

> "If there are no material facts which are contested it would be sheer folly to require the expense and delay of a trial when other methods of resolution are available." (at p. 29, 131.)

The Government submits there are no material facts genuinely in issue with respect to the violations discussed herein and their impact on the 1971 election. All violations need not be proved before a new election is ordered. Indeed it would be "sheer folly" especially in view of the discovery difficulties experienced to date, to require extensive, additional discovery in connection with the other alleged violations and a lengthy trial, when this case could be concluded on this motion.

With respect to the violations discussed herein no material facts remain in issue. Additionally their is no evidence either in defendant's position or which could

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possibly be gathered which could be offered to overcome the prima facie established presumption that the violations set forth in POINTS II, III and IV may have affected the outcome of the election.*

As a result of all that has been presented, the Court should order the IOMM&P to conduct a new election of officers subject to the supervision of the Secretary of Labor.

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* Defendant has advised us that he intends to take the depositions of the 16 IOMM&P members around the country who complained first to the union and then to the Secretary. No information secured therefrom could possibly be helpful in sustaining his burden. For example, with respect to the 481(g) violation caused by the Newsletter, "no tangible evidence can be available" to overcome the presumption. Some of the depositions have now been noticed. The Government will move to quash them as an unnecessary waste of time and a further obstruction of a most compelling conclusion to this case.

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CONCLUSION

WHEREFORE, plaintiff's motion for summary judgment should be granted and the IOMM&P should be ordered to conduct a new election subject to the supervision of the Secretary of Labor.

Respectfully submitted,

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Attorney
United States Department of Labor

-Of Counsel-

IN THE UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

JAMES D. HODGSON, Secretary of Labor UNITED STATES DEPARTMENT OF LABOR, Plaintiff, vs. INTERNATIONAL ORGANIZATION OF MASTERS, MATES and PILOTS, Defendant	NO. 72 Civ. 5031 (CBM)

DEPOSITION UPON ORAL EXAMINATION OF

CHARLES WILLIAM WALLACE

DATE: November 5, 1974

REPORTED BY: Donna M. Davis, C.S.R.

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DAVIS – IRWIN, CSR's
& ASSOCIATES
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SEATTLE, WASHINGTON 98171
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PLEASE MAKE ALL CHANGES OR CORRECTIONS ON THIS SHEET, SHOWING PAGE, LINE AND REASON, IF ANY, FOR NOTARY'S INSERTION INTO THE ORIGINAL DEPOSITION. SIGN THIS SHEET; SIGN DEPOSITION BEFORE NOTARY PUBLIC AT END ON LINE PROVIDED; AND RETURN THE ORIGINAL DEPOSITION TO 1525 PEOPLES NATIONAL BANK BUILDING, SEATTLE, 98171, FOR FILING WITH THE CLERK OF THE COURT.

PAGE	LINE	CORRECTION AND REASON
4	9	233 NE BLAIR ROAD (WRONG NAME)
4	6	THE WORD NOT SHOULD READ NOW

(Signature here and on deposition)

Subscribed & Sworn to before me this 15th day of November, 1974

Paul F. Lisbyer

Notary for the State of Wn.

SEATTLE, WASHINGTON; TUESDAY, NOVEMBER 5, 1974

1:00 P. M.

--oo0oo--

CHARLES WILLIAM WALLACE, deponent herein, being first duly sworn, was deposed and testified as follows:

EXAMINATION

BY MR. LAWYER:

Q State your name for the record, please, sir.

A Charles William Wallace.

Q Please spell your name.

A W-a-l-l-a-c-e.

MR. LAWYER: Let the record reflect that today's date is November 5, 1974. We are in the offices of United States Attorney in Seattle, Washington. We are going to take three depositions on today's date. The first will be the witness who has already been sworn, Mr. Charles W. Wallace. Two other witnesses will be Mr. R. J. Soriano, and a Mr. Lester Reynolds.

The deposition of Mr. Wallace was noticed to take place on November 4, 1974, in Portland, Oregon. By court order and subsequent agreement by the lawyers, it is taking place today in Seattle.

The depositions of Mr. Reynolds and Mr. Soriano

(By Mr. Lawyer)

were scheduled for today, that is, November 5, 1974, and by agreement between the lawyers the time was set for 1:00 P.M. rather than 10:30 as originally stated.

Mr. Drasin, I think we should just make a record with respect to the fact that at the present moment Mr. Charles Wallace and Mr. Soriano are both physically present in the room, and that you have indicated that you will not consent to exclusion of either witness while the other witness is being deposed.

That was the position that you took on behalf of the Union on November 4, 1974, in San Francisco when the witnesses by the name of Tuttle, Larson, and Caldwell were deposed. On behalf of the plaintiff I objected to that position.

I take it that is your same position again today?

MR. DRASIN: That is correct.

Let the record also show that rather than Mr. Hotchson being present we have Mr. O'Hanlon of the Department of Labor being present at the deposition. We have no objection to Mr. O'Hanlon also being present at the deposition, even though he is not Secretary of Labor at this time. He is a representative.

MR. LAWYER: Are you agreeable to simply stipulating that we both adopt the positions that we took in San Francisco with regard to witnesses?

(By Mr. Lawyer)

MR. DRASIN: Certainly.

I'm also stating for the record that Mr. Lester Reynolds was also produced, and I voluntarily agreed to excluse Mr. Reynolds from this hearing, since he is not an official of the defendant organization at this time.

MR. LAWYER: We will now not proceed with the questioning of Mr. Wallace.

Q Please state your residential address.

A 233 Northeast Blair Layer Road, Washougal, Washington.

Q Do you have any other residential address?

A No.

Q What is your business address?

A I'm the Port Agent for the Masters, Mates and Pilots Offshore Division in Portland, Oregon.

Q What is the address of your place of employment?

A 235 Southwest Front, Portland, Oregon.

Q What is your title, if you have one? What is your job, sir?

A Port Agent for the Masters, Mates and Pilots, Offshore Division.

Q How long have you had the position of Port Agent?

A Since October 1970.

Q How did you obtain that position?

A I was originally elected off the floor as the pro tem by the Portland membership and was later appointed by the

(By Mr. Lawyer)

exLocal 90's Executive Council to fill out Captain O'Callaghan's term, and I subsequently won the next election.

Q When were you selected on a pro tem basis? When did you first assume that position?

A I was pro tem --

MR. DRASIN: Excuse me.

You said Captain O'Callaghan?

THE WITNESS: I meant Captain Caldwell's term. I'm sorry.

Q Let me repeat the question: When did you first assume the position on any basis -- that is,by election or by pro tem, whichever was earliest --

A In 1969 I was pro tem, and then I went back to sea, and then I was -- I think it was May of 1970 I was reelected as a pro tem.

Q Who voted in this election?

A Just the local membership of that particular Union Hall. This is the way we used to do it.

Q Now, what was the number or name or area that that particular vote took place?

A In Portland.

Q Did you run for office in 1971 for that position?

A Yes, sir.

Q Who nominated you at that time, if you recall?

(By Mr. Lawyer)

A To be honest with you, I just don't remember.
Q Do you hold any other position in the Union, any titled position?
A No.

MR. DRASIN: He means do you hold any other position other than Port Agent? Are you a trustee? Are you anything else?

THE WITNESS: I'm an alternate trustee on the Pension and Welfare, I believe. I'm not sure what I'm on.

Q Tell us briefly --

MR. DRASIN: Apparently it's the Welfare Fund that he's an alternate trustee on.

Q Is that correct, Mr. Wallace?
A Yes, I believe it is.

MR. DRASIN: We will try to give you information on the issues.

MR. LAWYER: Off the record.

(Discussion had off the record.)

Q Tell us briefly what your duties consist of as Port Agent.
A Well, of course, collecting the dues, and Portland, of course, is just a one-man hall, and I also assist in paying off the Port Relief officer handing out the welfare forms and vacation forms. We also pay off the vacation there now. Of course, I meet the ships and settle any

(By Mr. Lawyer)

grievances that come up and just regular business agent work, you know.

Q Let us just focus now on the 1971 election, at which time you were the successful candidate for the office of Port Agent.

Is that correct?

A Yes.

Q Did you mail out campaign materials with regards to your election?

A I sent it back to New York to have it mailed out, yes.

Q Did you distribute any campaign materials other than materials that you mailed to New York for distribution?

A Well, I sent some around to the various Union Halls, yes.

Q What were the mechanics of that? How did you get them distributed to the various Union Halls?

A I just mailed them.

Q Where?

A Well, -- that is,

Q What area? What towns or cities?

A I think I sent a few to New Orleans to that Union Hall. Of course, all the Union Halls up and down the West Coast -- Wilmington, Seattle, San Francisco.

Q Did you make any mailings to individual union members?

A No.

Q How many mailings did you make to New York for

(By Mr. Lawyer)

distribution out of New York?

MR. DRASIN: Excuse me. Are you referring now to the initial election or the runoff election?

MR. LAWYER: Off the record.

(Discussion had off the record.)

Q In answering that question, restrict yourself to the original 1971 election,as distinguished from any subsequent runoff election.

A I'll try and remember.

I don't know if I sent anything out on that first election or not. I really don't remember.

Q You don't even know if the materials that you have already mentioned that you mailed to New York went out for the original election as distinguished from the subsequent runoff?

A What I'm going by is my checks and the dates on the checks. That's what I'm looking at.

It seems like to me those checks were in 1972. That's what I'm trying to do.

MR. DRASIN: Let the record show that I have handed to Mr. Wallace the Xerox copies of checks, which I have also supplied copies to counsel.

Q Why don't you look at those, sir, and refresh your recollection.

(By Mr. Lawyer)

A Well, here, I have the checks here. United Air Lines, where I had to send this air freight back to Margaret Carlson --

Q Let me tell you, can you just look at the checks without making a statement on the record and determine in your own mind when approximately you think you sent materials to New York?

A 1-18-72.

Q Are you placing a date of 1-18-72 in terms of when you paid for the distribution? In other words, did you send the materials to New York at or about the time that you made out the check?

A Yes.

MR. DRASIN: Off the record.

(Discussion had off the record.)

MR. LAWYER: Back on the record.

Q It is your best recollection, then, that you did not send out any materials for the original election?

A No.

MR. DRASIN: Your question is did he send out any materials for the original election through the AAA?

MR. LAWYER: Through the AAA, yes.

DRASIN: He's saying no to that. He's not saying no to the question of whether he sent materials

(By Mr. Lawyer)

to the various Union Halls to be distributed at the Halls. We're clear on that?

Q That's what I meant.

A I understood that you meant that.

MR. DRASIN: Thank you.

Q Did you mail any campaign materials to individual members, that is, by name, as distinguished to Union Hall?

A No.

Q In your capacity of Port Agent during the period that the 1971 election was going on, did you have access to any membership lists reflecting union membership?

A We got a copy -- it was an outdated list, but there is a copy in the office, yes.

Q When you say "outdated list," again referring back to the time after the campaign for the original 1971 election, how old was that list?

A I think it was 1969.

Q What is the practice insofar as updating membership lists, if there is such a practice?

A As far as I know, New York handles that. I don't have anything to do with it.

Q Is there any person above you in the Union who is actually in Portland where you work?

A No, no.

Q You are, so to speak, the number one person in the Portland

(By Mr. Lawyer)

area?

A Correct.

Q Who has access, again speaking with regard to 1971, during the time of the campaign, who had access to the membership lists other than yourself?

A Nobody.

Q Who, if anyone, made a demand or request for inspection of the membership lists during the time of the 1971 election?

A I don't recall anybody. Somebody may have, but I don't recall it. I just don't remember.

Q Do you recall whether or not any person was allowed to inspect a list with regard to the 1971 election?

A No.

Q That is, in Portland?

A No.

Q Do you know who ran against you for the position in 1971?

A There were about six or seven. Let's see. Bud Morris was one, Roy Perry was two, Schuman.

Q Let me ask you, I appreciate you're having difficulty remembering all of the names, but with regard to each person who ran against you do you recall specifically whether you were requested by either of those persons to be allowed to see membership lists?

A To the best of my knowledge, nobody asked me to see the lists.

(By Mr. Lawyer)

Norman Ralph, he was another one.

Q Did you yourself see a membership list in New York?

A No.

Q Did you personally see a membership list in San Francisco?

A No.

Q Do you know of any candidate running against you who saw a membership list in New York?

A To the best of my knowledge, no.

Q Do you know of any candidate who was running against you who saw a list anywhere?

A To the best of my knowledge, no.

Q Did you personally mail or cause any campaign materials to be mailed or otherwise forwarded to ships on your behalf?

A No, to the best of my knowledge, no.

Q Do you know whether anyone else caused any campaign materials to be mailed to ships on your behalf, that is materials which mention your name in a favorable fence, supported your election?

A Some people may have. I don't know of any. To the best of my knowledge, no.

Q I believe you have brought with you copies of checks.

A Yes, sir.

Q First of all, would you produce the copies.

(Discussion had off the record.)

(By Mr. Lawyer)

MR. LAWYER: May the record reflect that Mr. Wallace has handed me four sheets of paper, which are stapled together, that is, which represent two separate exhibits. May we mark these as plaintiff's Exhibit A and plaintiff's Exhibit B of today's date, and please note on the documents themselves the name of Mr. Wallace.

(Plaintiff's Exhibits A and B marked for identification.)

Q Mr. Wallace, I show you what has been marked as Plaintiff's Exhibit A. Now, this appears to contain photocopies of four separate checks, front and back.

Would you tell us first, what does the check which has the number 136 refer to?

A That was for my photograph.

Q What photograph was that, sir?

A That I used with my campaign literature and also in the paper that was put out.

Q What does check 172 refer to?

A I believe that was campaign literature. That was either for the literature itself or for the envelopes. I'm not sure.

Q What does check 213 refer to?

A That's additional letters for the campaign literature.

Q What does check 369 refer to?

A That's for stamps for mailing out the campaign literature.

(By Mr. Lawyer)

MR. LAWYER: Let the record reflect that that completes the photocopies of checks which appear on the sheets which have been marked Exhibit A. We will now be referring to Plaintiff's Exhibit B.

Q Tell us, Mr. Wallace, what does check 370 on Exhibit B refer to?

A Margaret U. Carlson. It was for mailing out the letters. That was for that AAA ballot that we were supposed to send it back to.

Q With regard to that payment to Margaret Carlson, tell us what you mean by mailing out the letters. What I am referring to is whether the check was payment for postage and affixing of labels on the envelopes.

A That was strictly for just the labels, just for affixing the labels on the envelopes only.

Q Is that to say that you put your own stamps on the envelopes?

A Right.

Q What does check No. 372 on Exhibit B refer to?

A That was United Air Lines for the air freight for the materials sent back to Mrs. Carlson.

Q What does check 391 on Exhibit B refer to?

A That was for the envelopes for the campaign literature.

Q Have you through these checks given up all of the payment slips or records that you recall having?

(By Mr. Lawyer)

A Correct.
Q Do you know a person by the name of Thomas O'Callaghan?
A Yes.
Q Tell us whether or not Mr. O'Callaghan contributed to your campaign.
A I don't know. If he did I don't know anything about it.
Q Tell us whether or not you contributed to Mr. O'Callaghan's campaign in 1971?
A To the best of my knowledge, no.
Q Do you know a person by the name of Mr. Robert Lowen?
A Yes, I do.
Q Tell us whether he contributed to your 1971 election campaign.
A To the best of my knowledge, no.
Q Tell us whether you contributed to his 1971 campaign.
A No.
Q Do you know a person by the name of William Caldwell?
A I do.
Q Do you know whether he contributed to your campaign in 1971?
A No.
Q Did you contribute to his campaign in 1971?
A No.
Q Do you know whether your name appeared on any campaign materials along with their names for the 1971 campaign?

(By Mr. Lawyer)

A I don't think so. I really don't know. I can't recall.
Q Do you recall any discussions with either of those three persons -- that is, O'Callaghan, Lowen, or Caldwell -- with regard to campaign materials?
A No.
Q Tell us what communications, if any, during the course of the 1971 election you had with the American Arbitration Association, apart from the checks that you have referred us to. In other words, --

MR. DRASIN: Just a moment. The checks he has referred to are with respect to the runoff election in 1972. He has introduced no checks with reference to the original election in 1971.

Q With that qualification, tell us what correspondence, telephone calls, or other forms of communications did you have with anybody employed by the American Arbitration Association in 1971. Again, referring to the original --
A To the best of my recollection, no, not at all.
Q You do not recall any communications with a person by the name of Mr. Tannenbaum at AAA?
A I don't think so.
Q How about communications with a Mrs. Carlson?
A This is 1971, on the original election?
Q Yes, sir, the original election.
A To the best of my recollection, I had no conversation with

(By Mr. Lawyer)

any of them.

MR. DRASIN: Not only conversations, but any letters. Did you receive any letters?

A I got one letter. All of the candidates got it.

Q You didn't initiate any calls or letters?

A No.

Q Do you know a person by the name of Lester Wolf?

A No.

MR. LAWYER: I have no further questions of this witness, Mr. Drasin. The deposition is concluded from my standpoint, unless you have some questions.

MR. DRASIN: I have no questions.

Any notary?

MR. LAWYER: Any notary.

MR. DRASIN: At the various depositions that have been taken previously in this matter, there have been numerous exhibits that have been marked, and Mr. Lawyer has retained the copies of those exhibits, except for one exhibit, which I have.

It is understood that Mr. Lawyer may continue to maintain the custody of those exhibits, pending the trial of this action, but that he will furnish Xerox copies of said exhibits to Marvin Schwartz, Esquire, who is the attorney of record in this case. I will furnish Mr. Schwartz a copy of the one exhibit which I have in my

(By Mr. Lawyer)

custody, and Mr. Schwartz will in turn make such a copy available to Mr. Lawyer.

MR. LAWYER: That is so stipulated.

Will you,also, supply me with a copy of that one exhibit that you have retained?

MR. DRASIN: What I said was that Mr. Schwartz would supply you with that exhibit. I will send it to him, and he will give you a copy.

MR. LAWYER: I understand.

(At 1:35 P.M. testimony of the above deponent was concluded.)

_____

CHARLES WILLIAM WALLACE

SUBSCRIBED AND SWORN TO before me this 15th day of _____, 1974.

_____

Notary Public in and for the State of Washington, residing at

_____

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, the undersigned Notary Public in and for the State of Washington, do hereby certify:

That the annexed and foregoing deposition of the witness named herein was taken stenographically before me and reduced to typewriting under my direction;

I further certify that all objections made at the time of said examination to my qualifications or the manner of taking said deposition, or to the conduct of any party, have been noted by me upon said deposition;

I further certify that I am not a relative or employee or attorney or counsel of any of the parties to said action, or a relative or employee of any such attorney or counsel, and that I am not financially interested in the said action or the outcome thereof;

I further certify that the witness before examination was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

I further certify that the deposition, as transcribed is a full, true, and correct transcript of the testimony, including questions and answers, and all objections,

motions, and exceptions of counsel made and taken at the time of the foregoing examination;

I further certify that I am sending the deposition in an envelope with the title of the above cause thereon, and marked "Deposition" with the name of said witness, and promptly delivering the same to the Clerk of the above-entitled Court;

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 7th day of November, 1974.

DONNA M. DAVIS, C.S.R.

Notary Public in and for the State of Washington, residing at Kirkland.

Page	Line	

IN THE UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

JAMES D. HODGSON, Secretary of Labor United States Department of Labor, Plaintiff, vs. INTERNATIONAL ORGANIZATION OF MASTERS, MATES and PILOTS, Defendant.	NO. 72 Civ. 5031 (CBM)

DEPOSITION UPON ORAL EXAMINATION OF

RUPERT JAMES SORIANO

DATE: November 5, 1974

REPORTED BY: Donna M. Davis, C.S.R.

51

DAVIS - IRWIN, CSR's
& ASSOCIATES
1525 PEOPLES NATIONAL BANK BUILDING
SEATTLE, WASHINGTON 98171
623-7881

APPEARANCES:

For Plaintiff:

PAUL J. CURRAN
United States Attorney
By: Bobby C. Lawyer, Assistant
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For Defendant:

KESSLER and DRASIN
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Los Angeles, California 90024

Also present:

BRIAN P. O'HANLON
Labor Management Services
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26 Federal Plaza
New York, New York

PLEASE MAKE ALL CHANGES OR CORRECTIONS ON THIS SHEET, SHOWING PAGE, LINE AND REASON, IF ANY, FOR NOTARY'S INSERTION INTO THE ORIGINAL DEPOSITION. SIGN THIS SHEET; SIGN DEPOSITION BEFORE NOTARY PUBLIC AT END ON LINE PROVIDED; AND RETURN THE ORIGINAL DEPOSITION TO 1525 PEOPLES NATIONAL BANK BUILDING, SEATTLE, 98171, FOR FILING WITH THE CLERK OF THE COURT.

PAGE	LINE	CORRECTION AND REASON
2	22	1ST WORD-ORGANIZATION INSTEAD OF ASSOCIATION
3	14	9TH WORD-RUNOFF INSTEAD OF REGULAR
3	15	6TH WORD REGULAR INSTEAD OF RUNOFF

Robert James Lavigne
(Signature here, and on deposition)

SEATTLE, WASHINGTON, TUESDAY, NOVEMBER 5, 1974

1:45 P.M.

--oo0oo--

RUPERT JAMES SORIANO, deponent herein, being first duly sworn, was deposed and testified as follows:

EXAMINATION

BY MR. LAWYER:

Q Please spell your name for the record, please.

A R-u-p-e-r-t, James S-o-r-i-a-n-o.

Q Are you also known as Rupe, R-u-p-e, sir?

A That is my nickname.

Q Give us your residential address.

A 7418 Northeast 18th, Bellevue, Washington, 98004.

Q Do you use any other residential address?

A No.

Q Give us your business address.

A 55 Bell Street, Seattle, Washington, 98121.

Q What do you do for a living, Mr. Soriano?

A I am the Seattle Port Agent for the International Q.L.D. ORGANIZATION ~~Association~~ of Masters, Mates and Pilots, Offshore Division.

Q How long have you held that position?

A For almost 17 years.

(By Mr. Lawyer)

Q When you first came to hold that position, how did you obtain it? That is, was it by election, appointment, or what?

A I was elected by the membership of former Local 90 on the secret referendum ballot of 90 days.

Q And you have subsequently been reelected to that position up until the present time?

A Yes.

Q You had unbroken service for that 17 years?

A 17 solid years.

Q What was the date of your last election to the position or reelection to the position?

A Sometime in 1972 at the completion of the runoff election for the 1971 regular election. They had a ~~regular~~ RUNOFF election at the completion of the ~~runoff~~ REGULAR election.

Q Tell us briefly what your duties are as Port Agent?

A Settle disputes, give the people information in regards to their claims, such as welfare claims, pension claims, vacation claims, negotiations, usually involved in the negotiations of the contracts when they are up for re-negotiations with the different ship owners.

Q What is the salary, the annual salary, approximately?

A Right now it's around $2,400 a month. I think to be exact $2,407.98. I think that would be pretty close.

Q I'm going to ask you a question and unless I indicate

(By Mr. Lawyer)

otherwise in the question I will be referring to the original 1971 election that you earlier referred to as distinguished from any subsequent runoff.

Do you understand?

A Right.

Q Did you cause any campaign materials to be distributed on your behalf with regard to the 1971 election?

A No.

(Discussion had off the record.)

MR. LAWYER: Let the record reflect that we went off the record, and Mr. Soriano out of an abundance of caution so that things are completely clear wished to amend slightly his no answer.

Q Mr. Soriano, would you state what you just stated off the record, the substance of it.

A Under the Offshore Division bylaws and the International Constitution, a member running for office has the right to submit a picture with 200 words to go into a supplemental election paper of the International Organization of Masters, Mates and Pilots.

Q What is this document or this publication? Does it have a formal title?

A It is the Master, Mates and Pilots is what we call it. That's about the money I spent on the election.

(By Mr. Lawyer)

Q Now, did your photograph appear in this publication with regard to the original 1971 election?
A Yes.
Q How much did that cost you, if anything?
A Approximately $11.
Q Was your name with regard to the 1971 election included on any campaign materials sent out by anyone else of which you are aware?
A No.
Q Does your office -- that is your port or office -- maintain any membership list?

Let me amend that question to say did it maintain a membership list during the period of the 1971 election?

A No.
Q Did you during the course of the 1971 campaign have access to any membership list out of the Union?
A No.
Q By having access to, I mean if you had wished to see one was one available to you? I do not mean that you, in fact, necessarily saw one.
A No. I saw no lists at all that is up to date.
Q I'm sorry. When you said you saw no list that is up to date, are you referring just simply to the Seattle area, or are you referring to any larger entity?
A This election was conducted under the former Local 90

BEST COPY AVAILABLE

(By Mr. Lawyer)

bylaws, and I think that the membership list that was last printed by Local 90 was in either 1968 or 1969.

Q So, your answers, I believe, from what you have just said, were referring to membership lists strictly for the Local?

A Right.

MR. DRASIN: Local 90, which comprised four ports.

MR. LAWYER: Yes.

Q You have testified, I believe, in substance that any lists that may have been available was outdated.

Was there, in fact, such a list, outdated or otherwise?

A Yes.

Q Approximately how old would that list have been in 1971?

A Over two years old.

Q In other words, it would have been a list that perhaps was made around 1969?

A 1969.

Q Did you refer to that list for any purpose during the course of the campaign in 1971?

A No.

Q Who ran against you for office in 1971?

A There was Frank Cain, Floren Dente, Arthur Pierce, James Haverfield.

Q With regard to the membership list that you have referred

(By Mr. Lawyer)

to, that is, the outdated one, tell us who had custody thereof.

A It was locked in the safe.

Q Who has access to the safe?

A I have. I'm the only one.

Q Of the several names that you have mentioned, that is, candidates in 1971 for your office, you were the only one who had access to it?

A Right.

Q Did any of those persons who ran against you request the opportunity to inspect that list?

A No.

Q At that time what were the rules in your area regarding inspection of membership lists by candidates, if there were any rules?

A The election was being conducted by the International Organization by convention action and by membership action. The rules were set down by the impartial agency and the ballot committee.

Q Prior to the time of the election itself, what were the rules in your area regarding inspection of membership lists?

MR. DRASIN: I'm going to object to that because the bylaws of Local 90 speak for themselves. It is unnecessary for him to repeat what's contained in Local 90

(By Mr. Lawyer)

bylaws.

We'll stipulate that whatever is contained in Local 90 bylaws were the rules.

MR. LAWYER: Do you have a copy of those bylaws?

MR. DRASIN: I think Mr. O'Hanlon has a copy of that, does he not?

MR. LAWYER: Off the record.

(Discussion had off the record.)

MR. LAWYER: Back on the record.

Let the record reflect that the witness, Mr. Soriano, has produced for us a copy of what purports to be the bylaws of the Union specifically for Local 90, and the years that appear on the cover of this document state: "As amended 1960, 1965 and 1967," and inked in is the year 1969.

Q Mr. Soriano, you have referred us to Article X, Section 2, of these bylaws, is that correct, sir, as containing the rules or practice pertaining to inspection of membership lists for the periods that the bylaws cover?

A Yes.

MR. LAWYER: Mr. Drasin, we do not appear to have a copy of these bylaws. Rather than mark the whole book and take it, I suggest that we simply xerox that page and mark it in and retain it.

(By Mr. Lawyer)

MR. DRASIN: It's agreeable with us that you could mark the whole book as an exhibit and have that as an exhibit to this deposition.

MR. LAWYER: Very well.

Would you mark this document as Plaintiff's Exhibit A of today's date, but reflect when you mark it the name of the witness.

(Plaintiff's Exhibit No. A marked for identification.)

MR. DRASIN: Just so that it's clear what we're referring to in this Section 2 provides in part as follows:

"During all elections of officers, the candidate shall have the privilege of inspecting the membership list -- that is the list of members of Local 90 -- for the purpose of addressing envelopes in which to send campaign literature."

Q During the course of the 1971 campaign, did you have any contact with the American Arbitration Association?

A A letter was sent out to myself as a candidate, explaining to me how much it would cost me if I wanted to send out literature.

Q That was still during the 1971 election; is that correct?

A That was before the start of the 1971 election.

Q Mr. Soriano, I show you a document which has already been marked as Plaintiff's Exhibit A for identification on

(By Mr. Lawyer)

October 30, 1974, with reference to the deposition of a person named Barbara. I ask you to look at this document by yourself for a moment, and then I will ask you a question with regard to it.

A (The witness complies.)

Q Now that you have reviewed the document handed to you, tell us whether or not that is a copy of the letter that you referred to as having received from the American Arbitration Association.

A Right, that is correct.

Q This document, that is, this copy is dated September 8, 1971. So, you stated that you received something from the AAA before the election ever started.

Is that still technically true?

A I don't recall. It was right around the time the election started so that the people could get their literature out.

Q In any event, whatever the date was or whenever the election started or concluded, this is a copy of the document you recall receiving?

A Right.

Q Sir, have you testified earlier -- and I'm asking. I have forgotten whether we covered that particular point -- did any person ever ask you for opportunity to inspect the membership list? Any candidate who ran against you in 1971?

(By Mr. Lawyer)

MR. DRASIN: That's been asked and answered. Objection. That question was asked previously, and he answered no.

Q Did anyone other than a person who ran against you request the opportunity to inspect the membership list?

A No.

Q Do you know of any person in connection with the 1971 campaign who went to New York to inspect a membership list?

A I have no knowledge of anybody.

Q Did you yourself go to New York to inspect a membership list?

A No.

MR. LAWYER: I have no more questions of this witness, and the deposition is concluded, Mr. Drasin, unless you have something.

MR. DRASIN: I have no questions.

Any notary?

MR. LAWYER: Any notary.

(At 2:00 o'clock P.M. proceedings in the above deposition weree concluded.)

Rupert James Soriano

RUPERT JAMES SORIANO

SUBSCRIBED AND SWORN TO before me this 14th day of November, 1974.

Joseph L. Granquist

Notary Public in and for the State of Washington, residing at Seattle, Washington

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, the undersigned Notary Public in and for the State of Washington, do hereby certify:

That the annexed and foregoing deposition of the witness named herein was taken stenographically before me and reduced to typewriting under my direction;

I further certify that all objections made at the time of said examination to my qualifications or the manner of taking said deposition, or to the conduct of any party, have been noted by me upon said deposition;

I further certify that I am not a relative or employee or attorney or counsel of any of the parties to said action, or a relative or employee of any such attorney or counsel, and that I am not financially interested in the said action or the outcome thereof;

I further certify that the witness before examination was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

I further certify that the deposition, as transcribed is a full, true, and correct transcript of the testimony, including questions and answers, and all objections

motions, and exceptions of counsel made and taken at the time of the foregoing examination;

I further certify that I am sending the deposition in an envelope with the title of the above cause thereon, and marked "Deposition" with the name of said witness, and promptly delivering the same to the Clerk of the above-entitled Court;

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 4th day of November, 1974.

DONNA M. DAVIS, C.S.R.
Notary Public in and for the State of Washington, residing at Kirkland.

LAWYER'S NOTES

Page	Line	

LAWYER'S NOTES

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DONNA M. DAVIS, C.S.R. & ASSOCIATES
903 SEATTLE TOWER
SEATTLE, WASHINGTON 98101
623-7881

IN THE UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

JAMES D. HODGSON, Secretary of Labor UNITED STATES DEPARTMENT OF LABOR, Plaintiff, vs. INTERNATIONAL ORGANIZATION OF MASTERS, MATES and PILOTS, Defendant.	NO. 72 Civ. 5031 (CBM)

DEPOSITION UPON ORAL EXAMINATION OF

LESTER L. REYNOLDS

DATE: November 5, 1974

REPORTED BY: Donna M. Davis, C.S.R.

52

DAVIS - IRWIN, CSR's
& ASSOCIATES
1525 PEOPLES NATIONAL BANK BUILDING
SEATTLE, WASHINGTON 98171
623-7881

APPEARANCES:

For Plaintiff:

PAUL J. CURRAN
United States Attorney
By: Bobby C. Lawyer, Assistant
United States Courthouse
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New York, New York 10007

For Defendant:

KESSLER and DRASIN
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Also present:

BRIAN P. O'HANLON
Labor Management Services
Administration
26 Federal Plaza
New York, New York

Reynolds

1744a

DONNA M. DAVIS, CSR, & ASSOCIATES
904 Seattle Tower
Seattle, Washington 98101

Please make all changes or corrections on this sheet, showing page, line, and reason, if any, for Notary's insertion into the original deposition.

PAGE	LINE	CORRECTION AND REASON
2	23	BRANCH # 6 VICE 8
17	3	IBC should read IBM
20	1	1ST WORD PROPERLY
20	9	CHANGE CANDIDATES ~~of~~ TO MEMBERS

Lester A. Reynolds
SIGNATURE

SEATTLE, WASHINGTON; TUESDAY, NOVEMBER 5, 1974

3:15 P.M.

--oo0oo--

LESTER L. REYNOLDS, deponent herein, being first duly sworn, was deposed and testified as follows:

EXAMINATION

BY MR. LAWYER:

Q Spell your name for the record, please.

A Lester, L-e-s-t-e-r, L. Reynolds, R-e-y-n-o-l-d-s.

Q What is your home address, sir, your residence?

A 2416 Dexter Avenue North, Seattle 98109.

Q Do you have any other residential address?

A No. That's my only residence address.

Q What is your business address?

A It's the Washington Tug and Barge Company, Pier 43, Seattle, Washington. They have a postoffice box number and I don't know what it is.

Q What is your occupation at present?

A I'm a master of a tug boat.

Q What job did you hold before you assumed your present job?

A I was the secretary-business manager for Branch #6 Vice 18 of the West Coast and Pacific Region of the Masters, Mates and Pilots, Inland Division.

(By Mr. Lawyer)

Q I might state for the record so that my question will be more clear to you that we have taken a series of depositions of people who are presently or have been in the Masters, Mates and Pilots Union, and we have referred an awful lot to the Offshore Division. You are, I believe, the first person who held a position in the Inland Division.

MR. DRASIN: I think probably the second period Mr. Valensi also had a position.

THE WITNESS: I was the original regional director.

MR. DRASIN: What I'm saying is that Joe Valensi also held a position in the Inland Division.

THE WITNESS: Maybe I can explain it just briefly.

Q I believe Mr. Drasin might be right, that Mr. Valensi did have a titled position in the Inland Division. In any event, would you tell us just briefly what distinguishes the Inland Division from the Offshore Division?

A The West Coast and Pacific Region of the Inland Division was formed by four separate branches, which were considered inland locals or were inland locals of the International Organization of Masters, Mates and Pilots. Those four were merged together on the West Coast, which then became the West Coast and Pacific Region of the Inland Division.

(By Mr. Lawyer)

Q How does a person become eligible or what are the requirements for being a member of the Inland Division, the minimum requirements?

A Well, you must have your dues paid. As far as I know, you have to be accepted into the organization, but you have to have your dues paid. That's the requirement.

Q Do you need any kind of license or certification?

A You didn't have to at that time because --

Q When you say "at that time," are you referring to around 1971 or what?

A Well, prior to forming the division. Even since then the Garmatz Bill now requires the Coast Guard or all people holding a job as a Master or Mate aboard a towboat, any size towboat, must have a license issued by the Coast Guard. Prior to that when you weren't required to hold any licenses, your eligibility had to be working in the capacity of a Master or Mate.

Q Now, what was the situation in 1971 during the period of the election for Union officers that were held in 1971?

A Are you referring to the International or the Inland?

MR. LAWYER: Off the record for a moment.

(Discussion had off the record.)

Q With regard to the 1971 election of officers for the International, sir, the Inland people -- that is, the

(By Mr. Lawyer)

Inland Division -- did have the right to vote for International officers; is that correct?

A That is correct, if they were paid up members.

Q Approximately how many Inland Locals were there in 1971?

MR. DRASIN: Are you talking about all over the United States?

MR. LAWYER: Yes. Perhaps let me withdraw that question.

Q Are you able to answer approximately what was the total membership of the Inland Division in that period?

A Well, the Inland Division at that time had not been formed. We were in the act of consolidating the Locals into divisions, of which the West Coast and Pacific was the first consolidation of any of the Inland Locals.

At that time there were four Locals on the West Coast, which consisted of Local 6, which was Seattle, Local 17 was Portland, Local 18 was Los Angeles, and Local 40 was San Francisco.

At that consolidation at that time Local 6 here in Seattle was roughly 385 to 400 members. 17 was probably close to 200. San Francisco Local 40 I would guess was around 85 or something like that. Local 18 in Los Angeles was a little bit smaller. The membership I don't actually recall offhand, but roughly that was what it was.

That was in 1971 when we was starting to consolidate.

(By Mr. Lawyer)

Q You have testified that Inland members could vote for International officers. Could Inland members back in 1971 run for International office?

A I don't really know for sure, but I believe if they were nominated at the convention they possibly could have. I don't recall. But I think they probably could, but nobody wanted the job, I'm sure.

Q Were you yourself a candidate for office in 1971?

A Yes.

Q For what office?

A For the Branch Agent of Branch 6 of the Inland Division. Also as Regional Director of the West Coast and Pacific Region of the Inland Division.

Q Do you recall the approximate period when the election took place; that is over what period of time?

A Well, we were -- and this is a difficult one for you to understand -- we were in the act of consolidating this Inland and West Coast group, and we had all the different periods of nomination, but we were then shifting the nominations to coincide with International dates. So, that meant that, as I recall, we had our nominations in June, the various meetings in June, and the balances came out,oh,along about September a certain date or something.

Then we had the 90-day voting period that went on and the ballots were counted just before the first of the

(By Mr. Lawyer)

year or along in there around the first part of December, and then they took office around the first of the year.

Q The election for Inland offices that took place, at least in large part, during 1971 did not overlap with the election for International offices and for the Offshore Division; is that correct?

A I don't quite follow you. If you mean was it done during the same period --

Q Was it done jointly I am saying?

A Not jointly. There was no connection with one election to the other, no way.

Q Tell us who, if anyone, supervised the Inland elections. That is, was there any entity such as the American Arbitration Association or some other organization?

A No, there was not.

Q Does that say that no one, as such, supervised it, no independent agency?

A No independent agency supervised it.

Q Do you recognize the letters AMW as meaning anything with regard to the --

A AMW?

Q Yes, sir.

A Under the charter issued to the Inland Locals, they provide for an AMW charter.

Q What do those letters mean, if anything?

(By Mr. Lawyer)

A It's been three years.

MR. DRASIN: Associated Marine Workers.

Q Tell us what Associated Marine Workers means, what it does, or --

A Associated Marine Workers group as such, would entail people not only in the wheel house but the rest of the crew members, as well, the skipper and the mate.

In other words, to be members of the Masters, Mates and Pilots in those days, you had to be working in the capacity of a Master and a Mate. In some areas the Masters, Mates and Pilots, as such, had contracts for various tugboats, which included all of the crew members, and they were not eligible as. There had been a charter issued to the locals to provide that they could organize as AMW's.

Q Does each Local have its own AMW?

A They're authorized AMW's. Branch 6 in Seattle, to my knowledge, has never used that. They may have in the last three years, but I have been out of it, but prior to that they did not use the AMW here.

Portland did, and I believe 18 in San Diego may have. I'm not sure.

Q Mr. Reynolds, did you attend a convention prior to the 1971 elections for the Union?

A Yes, I did.

(By Mr. Lawyer)

Q And did you attend this convention in Texas, that is, in Galveston, Texas?
A Yes, I did.
Q In what capacity did you go there? As a delegate or as an observer or what?
A I went there in the capacity of being the Branch Agent, as they now called, -- at that time we were the Business Agent -- for Local 6 of the Inland Division. By virtue of being a Local, we were allowed to go to the conventions.
Q Did you serve on an entity called the IBC, which spelled out refers to the International Ballot Committee?
A I was elected as a member of that Ballot Committee at the convention by the convention delegates.
Q Who nominated you, if there was a nomination?
A I don't recall.
Q You were nominated, as distinguished from being appointed?
A That's right.
Q How many meetings as best as you recall, took place -- that is, meetings of the IBC -- during the time that the convention itself was in session; that is the days over which the convention was held?
A I don't really remember what days they were. That information, I'm sure, --
Q Do you recall if it met at all?

(By Mr. Lawyer)

A Pardon?
Q Do you recall attending any meeting at all of the IBC in Galveston?
A No. The IBC did not meet in Galveston, to my knowledge. We all met back in New York.
Q How many meetings did you have in New York?
A Well, I'm not certain now because it's been so long. I don't have no record of it. The minutes of those meetings would show what we had, and I suppose they're available.
Q How many times did you go to New York in connection with IBC, that is, with reference to 1971 elections?
A I guess there had to be three, at least. I'm not sure now.
Q When you say there had to be three, are you referring to separate --
A I say I think there were at least three.
Q I understand that you are saying you can not be precise. But I am asking do you recall making three -- understanding there may be more or less -- trips, separate trips, individual trips, to New York?
A I'm sure there was because the first, as I recall, the first meeting, part of the members was unable to attend. So, we couldn't do too much on some of those meetings because of the sickness that was involved.
Q How were you notified about meetings of the IBC in New York? That is, were you telephoned? Did you get a letter?

(By Mr. Lawyer)

What?

A Well, I just don't remember now. I know we talked on the phone because as the Committee got set up Bob Nelson was the Chairman and he was on the West Coast. A lot of this was done on the telephone.

So, I'm not just sure now whether there were letters received or what. It could have been either one.

Q At any meeting that you may recall in New York of the International Ballot Committee, do you recall reviewing any materials pertaining to how the election would be conducted?

A Well, we certainly used the various bylaws that the Offshore Division had,and then when we were adopting the various rules, if there was a place where it wasn't specifically covered in the bylaws, we then would adopt something that the Ballot Committee could live with.

Q Mr. Reynolds, I ask you to look at Plaintiff's Exhibit A of October 29, 1974, which was so marked during the course of the deposition of Mr. Robert Nelson.

Look at this by yourself for a moment, sir. Then I'll resume questioning.

(Discussion had off the record.)

Q Now that you have reviewed that exhibit, sir, tell us whether or not you have seen a copy of that exhibit prior

(By Mr. Lawyer)

to today.

Let me withdraw that.

Did you see a copy of that exhibit during 1971? Let's put it that way.

A I'm not sure I quite understand what you mean by it. You mean have I seen these previously?

Q Yes, sir; copies of those.

A I'm sure that this was basically the material that was used for our references at the Ballot Committee.

Q And when you say "used for your reference," just what do you mean?

A Well, at this time they were consolidating all these divisions into one and as a Ballot Committee we were trying to make sure that everything that had been in the people's Locals and Divisions separated was protected as a whole; in other words, so that the members were offered a proper chance to vote on their officials, so that there was no cause or no way of neglecting a particular group that wasn't entitled to get a vote or that was entitled to get a vote.

Q Now, in regard to what you have just stated about making sure that people did get the right to vote if they so desired, are you familiar with the situation pertaining to Local 47 during that period?

A Local 47? Their per capita tax was not paid. In other

(By Mr. Lawyer)

words, they just picked up and moved out of the shelter or under the confines of the International Organization. They just pulled away and separated themselves from it.

Q Did Local 47 members receive ballots for the 1971 elections?

A No way.

Q Who made the determination that that Local would not receive ballots?

A They weren't qualified under the bylaws of being paid up members of the International Organization. Their per capita tax had not been paid or anything. They weren't qualified.

Q Did the IBC or any other body to your knowledge make a ruling, any other body or any other person, to the effect that Local 47 would not receive ballots or be allowed to vote?

A I'm sure that the Ballot Committee looked at these things. If they weren't qualified members and wasn't entitled to a ballot, absolutely they couldn't be on the mailing list to get such a ballot.

Q Let us go back now to the exhibit that is before you, the one that you just read.

Did you personally play any role in the preparation of the document; that is the information that went into the document?

A That's in this?

(By Mr. Lawyer)

Q Yes, sir.

A No way did I have anything to do with the preparation of this, no. To my knowledge I didn't.

Q Did you personally make any contributions to anybody's campaign with regard to the 1971 election for the International?

A No, sir.

Q Again referring to the period relative to the 1971 election of officers for the International and Offshore Division, did you serve on the GEB?

MR. DRASIN: General Executive Board.

A No.

Q Did you serve on any editorial board?

A I was appointed to the editorial board at one time, but I don't recall when that was. At that time it seems like it was when Sheldon was there, but I don't remember now because it's so damned long ago.

(Discussion had off the record.)

A The answer to your question, to the best of my recollection, I had nothing to do with the editorial board in 1971.

(Discussion had off the record.)

Q Just so the record is clear, Mr. Reynolds, I'm not sure my questions were inclusive enough to reflect whether or not

(By Mr. Lawyer)

you have ever been a member of the GEB, that is the General Executive Board, of the Union?

A To the best of my recollection, I don't believe I was.

Q At any time?

A That's right.

Q And you do not recall ever attending a meeting of the GEB in connection with the 1971 election?

A With the 1971 election, no.

Q Mr. Reynolds, with regard to the 1971 election again for the International Offshore and in your capacity as an IBC member, did you personally have anything to do with the preparation of the ballots themselves, that is, the format?

A Yes.

Q And tell us what you did in that regard.

A Well, as the Ballot Committee, we were the ones that put the ballot together, and such, and made sure that the regulations or rules that was established under the Constitutions as such, and the bylaws, as such, was secured. In other words, so that we didn't omit anything or didn't accept something that wasn't supposed to be in accordance with those regulations.

Q How about the mailing out of the ballots, that is the timing and the overseeing of this process?

A The actual mailing of the ballots was done, as I recall,

(By Mr. Lawyer)

by the American Arbitration Association.

Q You had nothing to do with that, that is, insofar as actual --

A The Ballot Committee, we were overseeing some of this stuff to make sure that it was done and done properly by the lists that they were presented, which was the ones that was approved as the paid up members and what have you. That was the list that they used.

But the actual mailing of the things and stuff --

Q Who supplied the list?

A Pardon?

Q You say the list that the AAA used. Who supplied them with the list, to the best of your knowledge?

A To the best of my knowledge they were supplied by the International if they were all at that time on the IBC listings. If they weren't, maybe they were supplied by the others. I'm not sure which way it was done, but it was an approved list of the members that were paid up and in good standing.

Q In that same vein, you testified earlier that members of the Inland Local did have the opportunity to vote for International officers.

Tell us what lists, if you know, were used in order to determine to whom ballots should be mailed with regard to people in the Inland Locals?

(By Mr. Lawyer)

A Speaking of the Inland Locals on the West Coast, which I was at that time secretary-business manager, we provided them with a current, up-to-date ~~IBC~~ IBM listing of the people who were eligible and qualified to vote for the International officers.

Q When you say "we," just who do you mean? Do you mean yourself at all?

A Between myself and the Branch 17, 18, and 40 because we were, in fact, consolidating into an IBM setup, which they now use, which is all run from the Seattle office here through the IBM system or its data processing, I think.

Q You supplied that list to whom?

A To the AAA, the American Arbitration Association.

Q Was any such list sent to International officers?

A Not to my knowledge.

Q Do you have any knowledge as to whether at that time the International officers had any copy of that list or, in substance, a membership list, whether it was that particular one or not, referring to the people in the Inland Locals?

A The list that would have been provided to the International office was the one that we in turn computed our per capita tax on and for our people to be on the mailing list, would be a list that would comprise all members. But the one that we supplied to the American Arbitration

(By Mr. Lawyer)

Association was a list of the members who were entitled to vote, were in good standing as of a certain date.

So, the list that the International would have would not be the same -- when I say "International," International had access to would not be the same one that was necessarily sent to the AAA.

Q In view of what you have said, would the list that the International had access to be a larger list than the list that the AAA had for the election?

A Yes. Logically it would be.

Q Now, did the International have the list that you referred to during the period of the election itself in 1971?

A Do they now have it?

Q Did they have it then? Have you caused them to be supplied with such a list prior to or during the 1971 elections?

A The list that was sent to the AAA?

Q No, sir.

A The other list?

Q Yes, sir.

A They had a list of our members at that time; in other words, the ones that were on our current mailing list and everything.

See, I might give you this "that there was a few things in the Inland Division which is different than the

(By Mr. Lawyer)

Offshore Division. In essence, we have people who are gone on their tugs sometimes from here for a year. Believe it or not, we have tugs that go that far away.

Some guys prefer to send in a check for their own dues, and there would be guys that would forget to send in in, and at the time of the election they were not currently up in dues. So, they were not entitled to a vote, but we were still considering them members because when they get back here they come in and pay up all their past dues and everything else.

So, the list would be a little bit different.

Q Mr. Reynolds, I ask you to look at Plaintiff's Exhibit A for identification, which was so marked during the course of the deposition of a Mr. Barbara on October 30, 1974, Please look at it first, and then I will question you about it.

A (Witness complied.)

Q Have you looked at that now?

A Yes.

Q Have you seen a copy of that exhibit before? Specifically, did you see a copy of that letter during 1971?

A Yes, sir.

Q How did you come to see a copy of it?

A Well, as a member of the Ballot Committee, we were the ones that helped provide and see that this information was

(By Mr. Lawyer)

properly
~~property~~ disseminated to all candidates so that they were aware of how they could get their literature to the members.

Q Would it be proper to infer from what you have just said that the IBC was ultimately responsible for the contents of that letter?

A We were to assure that the ballots were mailed to the proper people and that the candidates had the proper right to mail their literature to the qualified ~~candidates~~ members as well.

Q Did you participate in any drafting or discussion of the contents of that letter, that is, that exhibit, before it went out?

A This information looks like this was based on the instructions that we gave the American Arbitration Association, how they should handle the mailing of the candidates' brochures.

Q When you say "we," who do you mean?

A The Ballot Committee.

Q And you recall personally participating in discussions with regard to the information pertaining to that?

A Yes.

Q Are you presently in any way associated with the Union on a pay basis? Do you draw any salary or anything?

A No, sir. I'm a paid up member of the organization, and

(By Mr. Lawyer)

that's all.

Q You still are a member of the --

A Oh, yes. I'm still working under contracts under the Masters, Mates and Pilots.

(Discussion had off the record.)

Q Do you recall any discussion, sir, within the IBC concerning the availability of membership lists at various local ports, that is in various local cities, in connection with the election?

A This election again was during the consolidation period. So, what we were trying to do was follow the convention whereby the lists -- we'll say the source of the candidates' being able to get their letters to the members entitled to receive it, if you follow what I mean. In other words, they had to be qualified members in order to get the stuff mailed to them, and the way of doing it in our opinion was through the mailing agency which would have the lists available, but would have tight security over it. But the candidates could send their stuff to them and have it mailed out.

There was no list to be made available in any particular local or branches or divisions or whatever you want to call them.

Q Well, who decided that no such list should be available?

(By Mr. Lawyer)

A The convention in their new bylaws, the new constitution and bylaws of the consolidated group. It was specific on this.

MR. LAWYER: Off the record.

(Discussion had off the record.)

Q Sir, could you refer us to the specific provision in the copy of the constitution that stated October 1, 1970, that you are referring to.

A I believe that would be covered under Section 9 of Article V on Page 21.

Q Page 21 of that particular copy of the document that you have.

MR. LAWYER: Just so the record is clear, since we won't mark this constitution, as such, Section 9 is entitled "Miscellaneous Election Matters."

Q And you are referring to Section 9, Division A of Article V; is that correct, sir?

A That is right.

MR. LAWYER: I have no more questions of this witness, and the deposition is concluded, Mr. Drasin, unless you have something else.

MR. DRASIN: No questions.

MR. LAWYER: Any notary?

MR. DRASIN: Any notary.

(At 3:15 P. M. the above deposition was concluded.)

Lester L Reynolds

LESTER L. REYNOLDS

SUBSCRIBED AND SWORN TO before me this 11 day of November, 1974.

Notary Public in and for the State of Washington, residing at

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, the undersigned Notary Public in and for the State of Washington, do hereby certify:

That the annexed and foregoing deposition of the witness named herein was taken stenographically before me and reduced to typewriting under my direction;

I further certify that all objections made at the time of said examination to my qualifications or the manner of taking said deposition, or to the conduct of any party, have been noted by me upon said deposition;

I further certify that I am not a relative or employee or attorney or counsel of any of the parties to said action, or a relative or employee of any such attorney or counsel, and that I am not financially interested in the said action or the outcome thereof;

I further certify that the witness before examination was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

I further certify that the deposition, as transcribed is a full, true, and correct transcript of the testimony, including questions and answers, and all objections

motions, and exceptions of counsel made and taken at the time of the foregoing examination;

I further certify that I am sending the deposition in an envelope with the title of the above cause thereon, and marked "Deposition" with the name of said witness, and promptly delivering the same to the Clerk of the above-entitled Court;

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 7th day of November, 1974.

DONNA M. DAVIS, C.S.R.
Notary Public in and for the
State of Washington, residing in
Kirkland.

Page	Line	

Stipulation

BCL:cf
72-3882

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U.S. DISTRICT COURT FILED JAN 14 1975 S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Plaintiff,

-v-

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, AFL-CIO,

Defendant.

- X

STIPULATION

72 Civ. 5031 (CBM)

Notices having been served by the defendant to depose the following witnesses in the cities and on the dates hereinafter set forth:

Witness	City	Date
Jack Ofelt, Jr.	Portland, Oregon	12/20/74
Henry L. Nereaux	New York, N. Y.	1/6/75
Amos Koonce	New York, N. Y.	1/6/75
John A. Moralis, Jr.	New York, N. Y.	1/7/75
Victor Soto	New York, N. Y.	1/7/75
John R. Syebert	New York, N. Y.	1/8/75

And the plaintiff having moved for summary judgment seeking an order declaring the subject 1971 election of officers of defendant union void and the holding of a new election under the supervision of the Secretary of Labor; and the defendant having requested an extension of time to respond to said motion for summary judgment;

BCL:cf
72-3882

1771a

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their respective attorneys, that the said notices to depose are hereby withdrawn without prejudice; and it is further

STIPULATED AND AGREED that defendant's time to respond to plaintiff's motion for summary judgment shall be extended from January 2, 1975 to and including January 23, 1975.

Dated: New York, New York

December 19, 1974

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the Plaintiff

By: Bobby C. Lawyer

BOBBY C. LAWYER
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Telephone: (212) 791-1968

Marvin Schwartz

MARVIN SCHWARTZ, ESQ.
Attorney for Defendant

N.Y. N.Y.
1/13/75

SO ORDERED:

U.S.D.J.

Defendant's Notice of Motion/Cross Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- x

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Plaintiff,

-against-

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendant.

- x

U.S. DISTRICT COURT FILED JAN 23 1975 S.D. OF N.Y.

72 Civ. 5031 (CBM)

NOTICE OF MOTION AND NOTICE OF CROSS-MOTION

RECEIVED JAN 23 1975 JUDGE MOTLEY'S CHAMBERS

S I R :

PLEASE TAKE NOTICE that upon the annexed affidavits of Marvin Schwartz, sworn to January 22, 1975, Thomas W. Gleason, sworn to January 17, 1975, Burton M. Epstein, sworn to January 22, 1975, and Kenneth Camisa, sworn to January 22, 1975; the annexed Statement of defendant pursuant to Rule 9(g) of the General Rules of this Court; the annexed Statement of defendant in response to plaintiff's statement under Rule 9(g); the accompanying Memorandum on behalf of the defendant; and upon all the prior pleadings and proceedings herein, the defendant will move this Court on the 6th day of February, 1975, before The Honorable Constance Baker Motley, U.S.D.J., in Room 2001 of the United States Courthouse, Foley Square, New York, New York, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an Order granting summary judgment dismissing the plaintiff's complaint, or, in the alternative, for an Order granting partial summary judgment dismissing from the plaintiff's complaint certain alleged violations described therein as follows:

a) That the three International officers, by reason of such positions, also became the Executive Officers of the Union's Offshore Division.

b) No ballots were sent to members of former Inland

Local 47.

c) That non-postmarked ballots were not counted.

d) The membership lists were maintained for inspection and were available to candidates at the AAA office in New York, rather than in each of the ports.

e) That the distribution of campaign literature was made through the AAA office in New York rather than in each of the ports.

PLEASE TAKE FURTHER NOTICE that the defendant hereby cross-moves pursuant to Rule 56 of the Federal Rules of Civil Procedure for Summary Judgment dismissing from the plaintiff's complaint, an alleged violation described therein as follows:

That two elected Port Agents were wrongfully given the additional position of Vice President, Atlantic and Vice President, Gulf.

And for such other and different relief as may be just and proper in the premises.

Dated: New York, New York
January 23, 1975.

Yours, etc.,

MARVIN SCHWARTZ

By Burton A. Gaston.
Attorney for Defendant

Office & P.O. Address:
243 Waverly Place
New York, New York 10014
Phone: 212 691-2250

TO: PAUL J. CURRAN, Esq.
U. S. Attorney for the
Southern District of New York
Attorney for Plaintiff
U. S. Courthouse
Foley Square
New York, New York 10007

Attention: Dennison Young, Jr., Esq.

Affidavit of Marvin Schwartz

on behalf

of Defendant Union

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Plaintiff,

-against-

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendant.

- x

72 Civ. 5031 (CBM)

AFFIDAVIT ON BEHALF OF DEFENDANT UNION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARVIN SCHWARTZ, being duly sworn, deposes and says:

I am counsel for the defendant (hereinafter sometimes called the "Union" or "MM&P") in the within matter, and I have been International Counsel for the Union since 1956. I am familiar with all of the affairs and activities of the defendant.

OUTLINE OF AFFIDAVIT

This affidavit is submitted for several purposes. For ease of understanding, these purposes are as follows:

1. Plaintiff's Motion for Summary Judgment

Plaintiff seeks Summary Judgment declaring the 1971 Election of Officers conducted by the defendant void and ordering a new election under the supervision of the Secretary of Labor. Plaintiff has alleged in its complaint a number of violations committed by the Union during the course of its 1971 election of officers. In this motion, however, plaintiff has selected only five and bases its application for Summary Judgment on these five alone, which are as follows:

(a) The 60th Convention Newsletter constituted campaign literature.

(b) The "Eleven Pledges" newsletter, constituted campaign literature.

(c) Two elected Port Agents were wrongfully given the additional positions of Vice President, Atlantic and Vice President, Gulf.

(d) A delay in sending out the ballots may have affected the election

(e) Candidates for office in the Port of New York were denied their right to a membership list.

This affidavit is submitted in opposition to these five allegations.

2. Cross-Motion on Alleged Violation Relating to Vice Presidents

The alleged violation described in paragraph (c) above relating to the Vice Presidents was in no respect wrongful or illegal, but at any rate, the matter complained of cannot occur again. This affidavit is submitted in support of the Union's cross-motion for summary judgment dismissing this allegation from plaintiff's complaint.

3. Defendant Union's Motion for Summary Judgment

This affidavit is further submitted in support of the Union's independent motion for summary judgment dismissing the complaint on the ground that it is moot, in view of the intervening election conducted by the defendant and the facts and circumstances surrounding such intervening election.

4. Defendant Union's Motion, in the alternative for Partial Summary Judgment

Alternatively to the Union's independent motion for summary judgment dismissing the entire complaint on the basis of mootness, the Union moves for partial summary judgment dismissing certain alleged violations described in the plaintiff's complaint, but not urged on the instant motion of the plaintiff. These alleged violations, for which the Union seeks partial summary judgment of dismissal, involve the following matters:

(a) That the three International officers, by reason of such positions, also became the Executive Officers of the Union's Offshore Division.

(b) No ballots were sent to members of former Inland Local 47.

(c) That non-postmarked ballots were not counted.

(d) The membership lists were maintained for inspection and were available to candidates at the AAA's offices in New York, rather than in each of the ports.

(e) That the distribution of campaign literature was made through the AAA office in New York, rather than in each of the ports.

PRELIMINARY STATEMENT

It is important to note at the outset that this lawsuit does not involve any claim by the Secretary of Labor that the election was tainted with any element of violence, threats or intimidation. As can be seen from the complaint and the papers served by the Secretary of Labor on this motion, the issues in this case solely involve provisions of the Union's Constitution and By-Laws and factual issues relating to whether or not certain

documents distributed by the Union constituted campaign literature. No claim is made that there were any irregularities or fraud involved in the balloting procedures or related matters.

BACKGROUND MATERIAL

In order to be able to understand many of the issues involved in plaintiff's motion and defendants' motion and cross-motion it is appropriate to set forth some of the background of the defendant labor organization and the circumstances that led up to its 1971 election.

The election which took place in 1971 was the first to be held under the newly structured organization which came into being in October 1970 as a result of a membership referendum that adopted a new International Constitution which radically altered the internal structure of the Union.

Recognizing that this first election would be unusual, it was designated specifically in the new International Constitution to be the "transitional" election, and the period of occupancy of office was to be known as the "transitional term of office". Similar recognition of the unique nature of this first "transitional" election was set forth in the by-laws of the Offshore Division of the Union, which were drafted after the proposed new Constitution received Convention approval, and which came into being also by membership referendum on October 1, 1970.

To appropriately focus on the case at bar, it is in order to set forth some background narrative on the structure of the defendant union prior to its reorganization, and also some background material with respect to certain other contemporaneous events in which the Union was involved which the Secretary

has brought into the picture forming part of his allegations of wrongdoing in the lawsuit.

THE STRUCTURE OF THE UNION PRIOR TO OCTOBER 1, 1970

The International Organization of Masters, Mates and Pilots is a union composed primarily of licensed deck officers serving aboard American Flag oceangoing passenger, cargo and tanker vessels; ship's officers serving on tugboats and other inland craft on the rivers, bays and sounds of the United States; and pilots who navigate American and Foreign Flag vessels in and out of the various ports of the United States. The Union also has certain members who are employed by the United States Military Sealift Command and other governmental bodies, and also some unlicensed marine personnel.

Prior to 1970, the Union was composed of a number of semi-autonomous Offshore, Inland and Pilot Locals. The great majority of these were the Offshore locals, whose principal offices were in the major ports on the Atlantic, Gulf and Pacific Coasts. One of the Inland Locals, Local 47, had its principal office in Cleveland, Ohio, Local 47's membership consisted mainly of masters and licensed deck officers who sailed aboard vessels in the Great Lakes.

The rights, duties and privileges of the members were governed by an International Constitution, as well as by By-Laws of each man's individual local. There were three International officers, a President, Vice President and Secretary-Treasurer who were elected by all the members of the Union, and Local officials who were elected by the membership of each particular local. The salaries of the local officials were determined by each local. The annual dues of a member was determined by his

own Local's By-Laws, subject only to a minimum amount set forth in the International Constitution.

1779a

The International Organization of Masters, Mates and Pilots was the last of the maritime unions to maintain this semi-autonomous local structure. For many years, changes in the International structure had been the subject of a membership discussion. In March of 1968, a Constitutional advisory committee met for the purpose of recommending a new Constitution which would provide for consolidation of the existing locals along "division" lines. The recommendation of the Constitutional advisory group was printed in the March 1968 issue of the International newspaper, The Master, Mate and Pilot, and subsequently was placed before the International Convention which met in May of 1968. The broad outlines of the recommendation were sent out to the organization membership for an advisory vote. It was placed on the 1968 International election ballot in the form of a "Proposition A", and read as follows:

"PROPOSITION A

Consolidation of the Locals

Are you in favor, in principle, of a consolidation of the Locals of the International Organization of Masters, Mates and Pilots along the following lines:

1. Offshore Division - All Offshore Locals
2. Inland Division - All Inland Locals
3. Pilot Division - All Pilot Locals
4. Government Employees' Division

If the answer to the above is "Yes", a Constitutional Convention shall be called in accordance with the provisions of the International Constitution to implement the will of the membership.

YES	NO
___	___
___	___"

The proposition received an affirmative 5 to 2 vote of the Organization's membership.

Continued efforts along the road to consolidation resulted in the drafting of a new International Constitution, and thereafter, a completely new set of By-Laws for the proposed Offshore Division, which was hoped to be the first fully structured Division under the new Constitution.

A referendum of the entire membership approved the new Constitution, and a referendum of members of former Offshore Division Locals approved the creation of the Offshore Division and adoption of its By-Laws. Both the new International Constitution and the Offshore Division By-Laws became effective October 1, 1970.

LOCAL 47's WITHDRAWAL FROM THE ORGANIZATION

The proposed restructuring of the Organization was not a universally popular move. In particular, it was strenuously opposed by the leadership and membership of Local 47, the Inland Local headquartered in Cleveland, Ohio. Prior to the International referendum on the new Constitution, the membership of Local 47, by its own separate membership referendum voted to disaffiliate from the International Union in the event the International membership at large voted to approve the new Constitution and its restructuring of the Union.

The operative part of the disaffiliation resolution approved by the Local 47 membership referendum was as follows:

> Now, Therefore, be it and it is hereby resolved, that in the event the requisite majority of the International membership vote to approve the new Constitution (1) Local 47, Great Lakes and Rivers District, of the International Organization of Masters, Mates and Pilots, shall

thereby be deemed immediately to have terminated the relationship between Local 47 and the International and Local 47 shall no longer be affiliated with the said International Organization of Masters, Mates and Pilots; (2) that from that moment forth, reference to the International will be stricken from Local 47's books and records and the Local shall be known as Local 47,Great Lakes and Rivers District; (3) Local 47 shall take any and all action necessary and appropriate to protect and defend the institutional rights and interests of its membership.

It is further resolved, that the Constitution and By-Laws Committee of Local 47 shall prepare and submit to the membership for ratification revisions of the Constitution and By-Laws of Local 47 to effectuate this resolution.

Adopted by unanimous affirmative vote of the membership of Local 47, Great Lakes and Rivers District, International Organization of Masters, Mates and Pilots, in Convention assembled, March 6, 1970.

As stated previously, the new Constitution was approved by a majority of the Union membership, and came into effect October 1, 1970, thus bringing about the condition under which Local 47's disaffiliation became effective.

At no time has the membership of Local 47 voted to re-affiliate.*

MM&P AFFILIATION WITH THE ILA

The International Organization of Masters, Mates and Pilots held its 60th Convention during the period July 26 to 28, 1971, in Galveston, Texas. Many things were on the agenda for that Convention, among which was a proposed affiliation of the

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* The question of Local 47's status as a constituent body of the International Organization has been the subject of a lawsuit that previously was pending in this Court, bearing the title VINCENT LARCOMBE, and all others similarly situated v. INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARINE DIVISION OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, Civil No. 73 Civ. 1789 MEF. That suit, claiming that the membership of Local 47 were members in good standing of the International Organization at the time of the 1971 elections, has been discontinued with prejudice.

International Organization of Masters, Mates and Pilots with the International Longshoremen's Association. 1782a

Teddy Gleason, President of the ILA, made a speech to the delegates at the Convention. A resolution calling for the affiliation of the MM&P with the ILA, in the form of a proposed amendment tc the MM&P's International Constitution, was passed by the delegates to the Convention by a vote of 33 for and 1 against.

In the eyes of the overwhelming majority of the delegates, affiliation with the International Longshoremen's Association was of vital necessity for the continued survival of the MM&P.

The maritime industry, for many years has been racked with serious inter-union rivalries. The Marine Engineers Beneficial Association, the counterpart union to the MM&P representing licensed engineers aboard oceangoing American Flag vessels, has campaigned long and hard to destroy the age-old tradition of the primacy of the captain aboard the vessels, and substitute in his place, the Chief Engineer. In addition, the MEBA wages a continuous assault on the collective bargaining agreements of the International Organization of Masters, Mates and Pilots. They have gone so far in this direction as to charter their own union subdivision, the Associated Maritime Officers of District 2, MEBA, a subsidiary that allows into its ranks licensed deck officers as well as licensed engineers. This Association now competes for licensed deck officer jobs aboard oceangoing vessels by way of offering a variety of concessions to vessel owners.

Embarking on its newly structured organization the leadership of the MM&P, as reflected in the 33 to 1 vote, felt most strongly that the strength that ILA affiliation would give to the MM&P was of vital importance for the survival and continued growth of the MM&P*.

At the Convention, along with the passage of the resolution calling for a submission of the affiliation question to membership referendum, a ballot committee to conduct the referendum was elected by acclamation of the Convention delegates. The American Arbitration Association was designated to be the impartial balloting agency to conduct the amendment referendum.

The importance and urgency of the affiliation question was underscored at the Convention. By August 20, 1971, less than a month after the close of the Convention, the ballots on the affiliation referendum, totalling 10,107, were mailed by the AAA to the members for vote.

Attendant upon the submission of the ballots to the membership, a newsletter, entitled "60th Convention Newsletter on the Resolution of Affiliation of the IOMM&P with the ILA" was sent to all the Union membership. This newsletter reported on the resolution adopted at the 60th Convention, presented excerpts from statements made at the Convention by Teddy Gleason, and otherwise gave background material with respect to steps leading to the affilation resolution and the importance of such affiliation. The newsletter was mailed to the Union membership on August 19, 1971, the day before the affiliation ballots went out.

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* The affiliation of the MM&P with ILA was bitterly opposed by the Marine Engineers Beneficial Association and its ally, the Seafarer's International Union of North America. They protested such prospective affiliation to President George Meany of the AFL-CIO, but President Meany refused to take any steps to prevent the affiliation, and, moreover, gave approval to the prospective affiliation.

Although the affiliation with the ILA was overwhelmingly supported by the delegates to the 60th Convention, it was far from an overwhelmingly popular issue with the membership. Certain outdated prejudices against the longshoremen as a result of long-past racketeering in that union, and certain prejudices with regard to the ethnic makeup of longshore membership, made the outcome of the referendum vote highly uncertain. Those who were outspoken proponents of the affiliation were subject to considerable abuse and vilification by much of the membership. But at any rate, the sense of the Convention delegates as to the urgency and importance of the affiliation was such that, irrespective of the outcome to them personally, a strong newsletter urging the affiliation, was deemed to be a must for the continued survival of the International.

The count of the balloting, which was on a 90-day mail referendum, took place on November 23, 1971. The Affiliation Amendment passed by a vote of 2,595 to 2,296.

POINT I. THE 60th CONVENTION NEWSLETTER

Defendants deny that this Newsletter constituted campaign literature on behalf of any candidate in the 1971 MM&P election. Defendant's argument that the decision of Judge Croake is not determinative of this issue is set forth separately in the accompanying affidavit of Burton M. Epstein, Esq., and will not be repeated here.

The document itself, as previously stated, was sent out in tandem with the vital ballot on affiliation of the MM&P with the ILA. It is customary for the defendant union and labor unions in general, as will be testified to at the trial of this matter, to submit to the membership whether in the form of a Newsletter or otherwise, reports on the activities of the Union,

and specifically, reports and recommendations by the Union's governing body--here the Convention delegates--with respect to matters of importance to the Union.

The ILA affiliation was a matter of critical importance, and it was absolutely proper and within the scope of the Union to send out the Convention Newsletter reporting on the activities of the Convention and urging membership ratification of the merger ballot.

The affidavit of Thomas W. Gleason, President of the ILA which accompanies this Affidavit, also clearly sets forth the circumstances which gave rise to his comments at the MM&P Convention..

The timing of the affiliation referendum, the mailing out of the Newsletter, and the election balloting is important to stress. The Newsletter was sent on August 19, 1971, and the ballot on the ILA affiliation was sent out the very next day. More than a month elapsed before the balloting for the election commenced--those ballots were mailed on September 21, 1971.

In this connection, we are treated to a "damned if you do and damned if you don't" argument by the Secretary of Labor.

He first alleges that the Newsletter, despite its mailing the day before the affiliation ballot, was actually campaign literature in connection with the Union election whose balloting did not start until a month later. At the same time, as will be discussed later, the Secretary raises a further objection to the election, saying that the Union committed a violation by sending out the election ballot as late as September 21, 1971, and that the ballots should have been sent out by August 27, 1971. There is no doubt that if in fact such a timetable had been

followed, the Secretary of Labor would now be jumping up and down claiming that the sending of the ballots on August 27, 1971, so soon after the mailing of the Convention Newsletter of August 19, 1971, clearly showed that the Newsletter was really campaign literature. 1786a

Damned if you do and damned if you don't.*

Suffice it to say, that what the Secretary of Labor is urging is that the customary and regular business of the union--even on most critical issues--must be brought to a standstill, and, in fact, emasculated, when an election is nearby. This is farcical. A union's affairs are not and cannot be run this way, and testimony will be offered to show this. The affiliation issue was of monumental importance to the Union, and in view of the overwhelming mandate for affiliation that came from the 33 to 1 vote of the Convention delegates, it would have been a betrayal of the rights and interests of the Union members for the affiliation ballot to have gone out unaccompanied by a strong Newsletter recommending an affirmative vote on the affiliation.

Lloyd Sheldon may have complaints about the contents of the 60th Convention Newsletter since he, in fact, was the one delegate at the Convention who voted against the affiliation resolution. It swipes at those forces who were against affiliation, but remains focused on the affiliation issue. Any complaint by the dissenter Sheldon against the Newsletter frankly favoring affiliation cannot be elevated to or transformed into a valid complaint that it represents campaign literature in an upcoming election.

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* In fact, there was no "delay" for nefarious reasons as alleged by the Secretary of Labor. This point will be discussed later in this affidavit and is also the subject of the accompaning affidavit of Kenneth Camisa, the former Director of Research for the defendant.

Hostility Toward Affiliation

The venomous anti-affiliation literature, appealing to the basest racial prejudices, was appalling. It was in fact a mark of courage for those who supported the affiliation to speak out on its behalf. The advocates of affiliation were subjected to the most vilifying and outrageous personal abuse.

In the South, the racist opponents to affiliation distributed in volume to the MM&P membership a clipping from an April 1971 ILA publication showing Captain O'Callaghan shaking hands with black officials of the ILA, and also showing Joseph Gaier, an O'Callaghan slate candidate for Port Agent, Port of New York, also in company with black ILA officials. This pandering to racism permeated the vicious campaign conducted by the anti-affiliation forces. Attached to this Affidavit as Exhibit *A*, is a copy of such clipping.

The Secretary of Labor alleges that not only was the Convention Newsletter campaign literature, but it was campaign literature for O'Callaghan and for all those candidates who were on the O'Callaghan slate or were incumbents.

If the Secretary's latter theory is correct, then we should expect to see some parallel in the voting for all of the elective positions. That is, if the pro-affiliation literature was for all of the incumbents, it should have resulted in some similarity in results in all of the cases; if O'Callaghan won by 40% then Lowen should have won by 40%, Caldwell by 40%, Joe Gaier, the New York Port Agent, by 40%, and so on down the line.

The evidence in the case shows absolutely that no such correlation in voting even faintly resembling this occurred. The AAA certification of results, Exhibit M. to the Secretary's 9(g) statement, reveals, as a sample, the following;

NAME	POSITION	APPROXIMATE PERCENTAGE OF VOTES
Thomas F. O'Callaghan	International President	44%
William F. Caldwell	International Executive Vice President	48%
Robert J. Lowen	International Secretary-Treasurer	49.6%
James R. Silver	Assistant Port Agent, Baltimore	63%
Howard H. Williams	Field Representative, Savannah	75%
Patrick J. King	Port Agent, Boston	61%
Robert Jones	Port Agent, Galveston	58%
Robert N. Palumbo	Port Agent, Houston	68%
Joseph B. Gaier	Port Agent, New York	50.4%

The complete and utter lack of uniform results rebuts both theories of the Secretary--that the Convention Newsletter was campaign literature on behalf of not only O'Callaghan but all of his slate and the incumbents, and also the Secretary's theory that such Newsletter may have affected the outcome of the election.*

To sum up: From all of the foregoing and the accompanying papers in opposition, the Newsletter was not campaign literature; it was not campaign literature on behalf of O'Callaghan and all of his slate and the incumbents; the Newsletter did not affect the outcome of the election.

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* The International officers needed a 40% plurality to win; all other positions above required a simple plurality. It is an interesting sidelight to note that Captain O'Callaghan who was most prominent in advocating the ILA merger got the lowest percentage of votes in the above sample.

POINT II. UNION NOTICE - ALL CONSTITUTIONAL AMENDMENTS AND RESOLUTIONS OF THE 60th CONVENTION RATIFIED.

The Secretary contends that the document sent to the membership entitled "All Convention Amendments and Resolutions of the 60th Convention ratified - Affiliation of IOMM&P as the International Marine Division of the ILA (AFL-CIO) Affirmed" constituted campaign literature.*

The defendant denies that this document constituted campaign literature. It was as stated above with respect to the Convention Newsletter an ordinary union document sent in the union's regular course of business, reporting to the membership on the result of the significant ballot on the affiliation with the ILA. It followed the completion of the balloting, and properly notified the electorate of the outcome.

From the argument of the Secretary with respect to this document, it is once again apparent that what the Secretary envisions as being the only acceptable Union operation during an election time is a laboratory condition wherein the Union ceases doing all business in any other avenue.

It is apparent from the Secretary's memorandum, that the language of this document has no bearing on the issue. Commencing with the 60th Convention Newsletter, the Secretary permanently links anything pro-affiliation with O'Callghan and his slate and the incumbents. Consequently, even a single one-line statement advising the membership that the affiliation referendum passed, would be enough to be categorized as campaign literature on behalf of O'Callaghan, et al.

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* The Secretary prefers to call this the "Eleven Pledges" document. So be it.

Such a contention by the Secretary, we submit, falls by its own weight. This "poisoned fruit" doctrine, stemming from the Secretary's link between the vote on the affiliation and the vote on the election is wrong to start with, and cannot be applied to this "Eleven Pledges" notice. 1790a

The same arguments which we discussed above reciting the substantial unpopularity of the affiliation issue, and the disparity in the percentage of election returns among the O'Callaghan slate, despite his allegation that the affiliation issue and the Newsletter applied to all slate members are similarly applicable to this document. So, too, is the conclusion above that the document did not affect the outcome of the election.

Again, evidence will be submitted at trial to show that documents of this kind sent to members are routine and completely within the normal operations of the MM&P and of other labor unions as well.

To sum up this Point: The "Eleven Pledges" document was not campaign literature; it was not campaign literature on behalf of O'Callaghan and all of his slate and the incumbents; the "Eleven Pledges" document did not affect the outcome of the election.

POINT III. OFFSHORE DIVISION VICE-PRESIDENTS (ATLANTIC AND GULF)

The Secretary surrounds this simple issue with flamboyant language seeming to infer that certain significant bodies of the membership were denied participation in the selection of the two Vice Presidents.

In actuality, what occurred here, was that for this one transitional election, the persons who were respectively elected to be the Port Agents for the Ports of New York and Galveston would automatically, solely for this transitional period, be the Vice-Presidents for the Atlantic Region and the Gulf Region.

The Union, as heretofore stated, specifically cross-moves with respect to this allegation, requesting that it be stricken from the plaintiff's complaint. As will be described below, it is moot for a number of reasons, and no relief can now be granted with respect to this allegation.

Pursuant to the Offshore Division's By-Laws, the 1971 election was the transitional election. For that one election only, the individual who was elected from and by the membership of the New York Port would be the Vice-President (Atlantic) and the individual elected from and by the membership of Local 20 (Galveston-Houston area), would automatically be the Vice-President (Gulf).

The Offshore Division By-Laws further provided that in the next election any member of the entire Offshore Division, irrespective of his "home port", would be eligible to be a candidate for any Offshore Division office, and, correspondingly, all Offshore members would vote for all Offshore Division positions. Thus, the passage of time has rendered this charge moot, since the election which was conducted in 1974 was under these new rules.

The second aspect of mootness came about in January, 1974, when, by referendum vote, the Offshore Division membership amended the Offshore Division By-Laws to eliminate the separate positions of Offshore Division Vice-Presidents.

The amendment voted affirmatively by the Offshore Division membership read as follows:

"AMEND BY-LAWS IN ORDER TO FURTHER REDUCE EXPENSES

This Article was discussed for several hours and it was the unanimous opinion of all of the members of the Offshore Division Executive Council that the following amendments to the Offshore Division By-Laws are essential to prevent a further worsening of the financial condition of the Offshore Division and the Organization. For example, as the By-Laws now read, it can and has been argued that there must be three additional officials elected as Vice-Presidents. Further, as the By-Laws now read, the Offshore Division can find itself in the position of having to elect Field Representatives for ports already closed.

* * * * *

The Offshore Division By-Laws shall be amended wherever and in such respects as are necessary, to provide the following:

1. The three elected Vice Presidents shall not be in addition to the elected Port Agents.

2. The Vice President (Atlantic) shall be the Port Agent of the Port of New York; the Vice President (Pacific) shall be the Port Agent of the Port of San Francisco; the Vice President (Gulf) shall be the Port Agent of the Port of Galveston.

3. As economic necessity or as service to the membership may require, the Offshore Division Executive Council shall by the majority vote, have the authority to close, reclassify or merge ports, and to designate all Field Representatives."

The implementing change made in the Offshore Division By-Laws was as follows:

"Article III, Section 1(a) is amended by adding the following paragraph:

'The candidate elected as Port Agent, New York, shall, by reason of such election, also be and hold the position of Vice-President (Atlantic); the candidate elected as Port Agent, San Francisco, shall, by reason of such election, also be and hold the position of Vice-President (Pacific); the candidate elected as Port Agent, Galveston, shall, by reason of such election, also be and hold the position of Vice-President (Gulf).'"

As stated above, the 1974 Elections were conducted in accordance with the new provisions, and were division-wide in eligibility and vote. Consequently, there is no relief that can be given with respect to this charge.

Although it is unnecessary to make further comment on this charge in support of the cross-motion for dismissal, a few observations are appropriate.

First, one argument the Secretary may raise against mootness--although not applicable here where the separate position is no longer in existence--is that the individual who came to office by reason of an impropriety should not be able to use such position to gain advantage in a succeeding election, and, therefore, the mere occurrence of an intervening, unsupervised election, is insufficient to render the complaint moot.

Such theoretical reason for denying mootness is not present in the instant case. There is no complaint made about any impropriety (other than the other general claims of impropriety in the Secretary's suit to which we are elsewhere responding) specifically related to the positions of New York Port Agent and Galveston Port Agent. That is, Joseph Gaier was elected to the position of Port Agent, New York and Robert Jones was elected to the position of Port Agent, Galveston. Any advantage which they may have obtained by reason of an incumbency, was not obtained by reason of holding the challenged position of Vice-President, but had been obtained by reason of holding the unassailed position of Port Agent. Therefore, no added "advantage" was gained by reason of this dual office.

Moreover, the By-Law provision relating to the transitional election was sound in concept and non-violative of law.

The membership of the Port of New York (former Local 88) was the largest of all of the Atlantic Ports. Similarly, the membership of the Port of Galveston was the largest of all of the Gulf Ports. It was logical, therefore, for the agents who would be elected by the membership of the largest respective ports to be also given the second title.

In addition, when the By-Laws were drafted and the interim measures placed into effect, there was some uncertainty as to the necessity of having separately elected officials for Offshore Division Vice-Presidencies. Whether such separate positions might prove redundant, could be better determined after the experience of the transition period was gained. As noted above, it was determined that there was no need for these additional elected positions, and the amendment to the Offshore Division By-Laws, eliminating these separate provisions, was placed into effect.

Further, the Secretary's argument is basically fallacious. It is predicated on the theory that a member is being deprived of the right to vote for someone who would be his officer--the "disenfranchisement" argument. The realities of the activities of the Port Agent during and under the transitional period and, indeed, during and under the Union structure prior to 1970, contained the same theoretical elements of disenfranchisement, but were never complained about, and, indeed, were not unlawful.

That is to say the following: In the transitional election, as well as under the prior semi-autonomous local structure, the membership of the Local in each port voted for their local officers. The President of Offshore Local 88 was voted for only by Local 88 members, and so on down the line.

The membership of these Offshore Division Locals consisted of licensed deck officers sailing on oceangoing vessels. These members come from all of the different ports. Thus, for example, a vessel could have on it a captain who was a member of Local 88, a chief mate who was a member of Local 14, a second mate who was a member of Local 90, one third mate who was a member of Local 24 and one third mate who was amember of Local 15.

This ship might complete its voyage in the Port of New York, the "jurisdiction"of Local 88. The second mate, a member of Local 90, might, at the payoff, have a claim for overtime that was disputed and not paid by the company. The local 90 member would turn to an official of Local 88, for whom he had not voted, to present his grievance to the company, and to represent his claim. This was, and still is, a constant event, simply by reason of the nature of the maritime industry. Thus, you always had officials, for whom a member did not vote, representing them and acting on their behalf.

Similarly, under the semi-autonomous system which existed for many years, the locally elected officials comprised the Union's International Executive Committee, casting weighted votes in that chief governing body, whose ultimate decision was to control the affairs of the entire Union and its members. Thus, the President of Local 88, with a larger membership, through his greater weighted vote in the International Executive Committee, would exercise more control over the affairs of a member of Local 15 than would the President of Local 15 himself.

This type of structure is typical of many unions, and no case that we are aware of has ever declared such a setup to constitute "disenfranchisement" of the right vote for one's union official.

Finally, as is discussed later and in greater length, the anti-O'Callaghan slate candidates for these two offices have defeated the incumbent O'Callaghan slate candidates in the 1974

election; Charles A. Hemming has beaten Joseph B. Gaier in New York, and Arthur Holdeman has beaten Robert L. Jones in Galveston. Therefore, on all counts this issue is moot.

We have, perhaps, in this lengthy discussion, indulged ourselves in using a cannon to kill a fly. But to sum up: On the mootness point, (a) by reason of the disappearance of the separate positions of Vice-President; (b) the election procedures in the post-transitional terms which have been followed in the current election wherein all Offshore Division members were eligible to be candidates for and vote for all Offshore Division officers; (c) the unquestioned propriety of the 1971 vote for the Port Agent of New York and Post Agent of Galveston positions, per se, and (d) the defeat of the O'Callaghan slate for these positions in the 1974 election, plaintiff's motion predicated on this allegation, should be denied, and the Union's cross-motion for partial summary judgment dismissing this allegation from the Secretary's complaint should be granted.

POINT IV. BALLOTS NOT MAILED WITHIN THIRTY DAYS AFTER THE CLOSE OF THE NOMINATING PERIOD.

In this issue, also, the Secretary of Labor, without a shred of evidence relating to the time problems and physical difficulties relating to the mailing out of the ballots, engages in the wildest speculation and comes up with a conclusion that the mailing of the ballots was purposefully delayed for some nefarious reason. This is all absolutely hogwash.

The accompanying affidavit of Kenneth Camisa, who, at the time of the election, was the Research Director of the defendant Union, sets forth clearly the problems that surrounded the preparation and mailing of the ballots for the unique 1971 transitional election. I will repeat here only the highlights of that affidavit.

The new Constitution of the International, which became effective in October, 1970, was, necessarily, the first document to be drafted providing for the massive restructuring of the Union. As can be seen from that Constitution, the provision for the mailing out of the ballots (Article V, Section 8(d)) not later than the thirtieth* day following the close of the nominating period, related solely to ballots for only three officers--the International President, the International Executive Vice-President and the International Secretary-Treasurer. See Article V, Section 5, of the International Constitution.

Subsequent to the drafting of the International Constitution, the Offshore Division By-Laws were drafted. These By-Laws provided, in Article V, that the election for the Offshore Division officers was to be conducted along with the election for the International Officers, and to be supervised by the same International Ballot Committee which was elected in accordance with the International Constitution, and similarly that the Offshore Division election was to be conducted by the same impartial balloting agency, the American Arbitration Association, selected by the Convention subject to the same rules and conditions as outlined in the International Constitution for International elections, except as specifically provided for in the Offshore Division By-Laws.

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* It should also be noted that pursuant to Article V, Section 5, any candidates who are nominated have 10 days after the close of the nominating period in which to advise the International Secretary-Treasurer in writing, that they will accept the nomination. Within that same 10-day period of time, any accepting nominee has an opportunity to submit a statement, not to exceed 200 words, which was to appear at the ballot. Therefore, in effect the Constitution, if read this way, seems only to provide 20 days for the preparation of a ballot for three positions. Alternatively, it can be read to provide that the 30-day period starts after the 10 days in which the candidate has to accept his nomination which would be the true close of the nominating period.

Therefore, the 1971 election to be supervised and conducted by the International Ballot Committee and the AAA, was to be an election not merely for three officers, but, rather, for every Offshore Division office, and every Pilot as well*. This meant an election of fifty officers plus an election for Convention delegates from each of the ports. All told, there were in excess of 175 candidates for all of these offices that were to be voted for in the 1971 Election.

For the Offshore Division alone, it was necessary, therefore, to prepare nine separate ballots. In addition, there had to be prepared a separate ballot for the Inland Division members and a separate ballot for the Pilots Division.

In the preparation of each of these separate ballots, the problems as to the order in which the names would appear, so as not to favor any candidate, had to be decided upon by the ballot committee. In addition, challenges that had been made to the ballot committee had to be gone over. Further, rulings had to be made by them on the different jobs that were to be filled in each port.

In view of all of the work that was required, it is indeed remarkable that the ballots were mailed out as quickly as they were on November 21, 1971. The Secretary claims the ballot should have been mailed no later than August 27, 1971, thirty days after the end of the nominating period. If we add the 10 days afforded to each candidate for the right to send in his statement, we come very close in any event to a 30-day period, and under any fair reading of the Constitution and the intent behind it in light of the surrounding circumstances, well within the spirit and reasonable mailing requirement which the Constitution sets forth.

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* The Pilot Division was fully formed by the time of the 1971 elections, and they, too, held their individual elections along with the International and the Offshore Division.

Additionally, as was mentioned in the affidavit of Mr. Camisa, the AAA was conducting the near-concurrent referendum on the affiliation with the ILA. Those ballots went out August 20, 1971. The AAA, being the independent body selected to conduct both ballots, had indicated to the International Ballot Committee its reluctance about sending out the two ballots too close together, since they were concerned that it might be confusing to the membership who might inadvertently return the ballots in the wrong envelopes which could have resulted in the voiding of their votes in both elections. The AAA, in view of this, was completely in accord with the time schedule that eventually resulted and at no time urged that the election ballots be sent out any earlier than they were. Evidence in support of this will be adduced at the trial of the action.

The alleged skullduggery which the Secretary ruminates on in his Memorandum is just not the case. Exhibits D1 through D9 and F1 and F2 to the Secretary's 9(g) statement, show the eleven separate ballots that had to be prepared, and the number of candidates who were running for office.

The Secretary's argument that the delay "allowed" the MM&P's magazine the "Master, Mate and Pilot" to come out, is again a part of the Secretary's misconceived "laboratory condition" theory of Union activities. That magazine is Exhibit GG to plaintiff's 9(g) statement. The contention that it was campaign literature did not impress Judge Croake. It is a fair descriptive report on the activities of the Union, and absolutely not campaign literature, and did not affect the outcome of the election. The Secretary's comments about its emphasis on the affiliation issue have been gone into above, and, as demonstrated there were of no affect on the outcome of the elections.

We respectfully refer the Court to the additional points describing what transpired during the period of time when the ballots were being prepared and prior to the mailing which are set forth in Mr. Camisa's affidavit.

The Secretary's motion with respect to this allegation is completely without merit and cannot be the base for the granting of summary judgment.

POINT V. THE LOCAL 88 MEMBERSHIP LIST

The argument relating to Judge Croake's decision on this issue is set forth in the accompanying affidavit of Burton M. Epstein, and will not be repeated here. It is enough to say that as was the case with the 60th Convention Newsletter, no evidentiary hearing was held by Judge Croake on the membership list issue, and, moreover, such membership list issue was not even before Judge Croake in any of the affidavits or demand for relief submitted to him on the preliminary injunction issue.

Of significant importance, however, is the fact that even Judge Croake did not find any violation as the Secretary seems to be complaining of.

In this regard, we are treated to a quintessential example of semantic legerdemain when we look at the Secretary's memorandum with regard to this issue. At page 30 he speaks about the plaintiff's seeking to "disgorge" a certified mailing list. At page 33 he speaks about requiring "the production" of the Local 88 mailing list. At page 92 he speaks about a refusal "to provide" a Local 88 mailing list. At page 95 he speaks about candidates "in possession" of the copy of the mailing list.

The simple fact of the matter is that Judge Croake did not issue an order stating that the Local 88 candidates were entitled to physical possession of a mailing list. This is set forth in his endorsed order attached as Exhibit II to the Rule 9(g) statement of the Secretary. This order came about after a motion had been made by the Union for reargument on this point, wherein Judge Croake stated in part as follows:

> "Defendant now seeks, in its moving papers, relief from a remedy which was not granted. The Court has not been requested in the Complaint nor has it ever ordered that plaintiff obtain 'physical possession' of mailing lists.
>
> "This new issue is not properly presented in this motion for reargument."

We are left then with the only real question on this issue: whether the Local 88 mailing list was "available" to candidates, and this has nowhere been denied. The list always was available to candidates at the office of the American Arbitration Association in New York, where Local 88 has its headquarters.

And it is such availability, and not the right to physically obtain a copy of the mailing list, which was all that a candidate for office in Local 88 was entitled to under the Local 88 By-Laws.

At the trial of this action evidence will be introduced to show that in 1967, the same provision was found in the Local 88 By-Laws with respect to membership lists as is set forth in the Local 88 By-Laws attached as Exhibit HH to the Secretary's 9(g) statement. It will be further shown at trial that during the 1967 Local 88 election of officers, Israel Ben Scheiber, an

arbitrator for the American Arbitration Association, under whose auspices the Local 88 election was conducted, determined, on the same question of the right of a candidate to physical possession of the membership list, that the Local 88 By-Laws did not require the physical delivery of a membership list to a candidate for Local office. It will be also shown that a subsequent Local 88 election was held in 1969, in which the 1967 ruling of Arbitrator Scheiber that a candidate for office was not entitled to physical possession of a copy of the list, was followed and abided by,* and that the appropriate Local 88 governing body interpreted and found the provisions of their By-Laws not to entitle a candidate to physical possession of a membership list.

From the foregoing, it is urged that the Secretary's motion with respect to this allegation relating to the Local 88 membership list is without substance, and cannot be the basis for the granting of summary judgment.

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* There is no statutory requirement that entitles a candidate to physical possession of a membership list.

CONCLUDING REMARKS
ON PLAINTIFF'S MOTION

As shown from the foregoing, the allegations set forth by the Secretary in support of his motion for summary judgment are all without merit, and consequently, his motion should be denied.

Moreover, the Union has raised an affirmative defense to this action which remains in issue, and, consequently, on this ground alone, the motion should be denied.

The complaint to the Secretary of Labor on behalf of the several complainants, according to the Secretary, was filed with him on March 29, 1973. Among such complainants was one Jack Ofelt.

The final intra-union remedy available to the complainants was an appeal to the Union's General Executive Board, as admitted by the Secretary. The General Executive Board entertained the appeals of the complainant's on January 25 and 26, 1971. The complainants knew that the General Executive Board was meeting on January 25 and 26 to take up the appeals and Mr. Ofelt was invited to attend, but he declined to do so. The Board denied the appeals on January 26, 1972.

The statute (29USC §482) requires that a complaint be filed with the Department of Labor within one calendar month after the exhaustion of intra-union remedies. The complainants should have filed their complaint with the Secretary no later than February 26, 1972. Consequently, complainants have not complied with the statutory requirement.

The Secretary does not allege that the complainants did not know of such denial at the time it was made on January 26, 1972. At best he alleges that no written notice of the denial of the appeals was given to the complainants until Burton Hall

received the letter from Captain Lowen on March 2, 1972 (See Plaintiff's Memorandum p. 101). With this issue and defendant's affirmative defense still remaining factually in dispute, plaintiff's motion for summary judgment cannot be granted.

From all of the foregoing, therefore, Plaintiff's Motion for Summary Judgment should be denied.

UNION'S INDEPENDENT MOTION
FOR SUMMARY JUDGMENT

The defendant Union moves independently for summary judgment dismissing the complaint of the Secretary of Labor on the ground of mootness, inasmuch as the Union has conducted an untainted, intervening election in accordance with its Constitution and By-Laws, and that under the circumstances and within the discretion of this Court, no useful purpose would be served by ordering a further election under the supervision of the Secretary of Labor. Moreover, a supervised election described to be mandated in order to vindicate "the interests protected by Section 401" is in fact, unnecessary and redundant in view of the outcome of and facts surrounding the intervening election.

The election which is under attack by the Secretary of Labor in this lawsuit is the one that took place in 1971. Pursuant to the Union's Constitution and its several Divisional By-Laws, it has conducted its next regular election during the period October through December, 1974. The election procedures which were followed in the 1974 election were in complete conformity with the International's Constitution and its various Divisional By-Laws, and once again were conducted by the American Arbitration Association.

Complete procedural safeguards have been maintained. All challenges that have been presented by any of the candidates in the 1974 election have been heard and ruled upon by the International Ballot Committee, none of whom were candidates in the election. In addition, further appeals from the rulings of the International Ballot Committee were made to Burton Turkus, the Arbitrator who was appointed under the election rules of the American Arbitration Association to hear and determine any challenges to balloting procedures made by any of the candidates in the election.

The scope of such appeals which have been heard and ruled upon by Mr. Turkus have been wide, concerning alleged invalid ballots, void ballots, eligibility requirements, etc. Absolutely no question of fraud in any of the balloting procedures has been raised.

For instance, a challenge was raised with respect to certain ballots sent to members belonging to one of the Inland Regions having been addressed to them in care of the company for which they worked. Mr. Turkus issued a ruling validating such ballots, which resulted in those members not being disenfranchised from their right to vote. This ruling has not been further challenged by any of the candidates.

We are, naturally, aware of the Glass Bottle Blowers Association case cited by the Secretary in his memorandum. However, in view of the circumstances surrounding this intervening election, and the results, the policy reasons for conducting a supervised election as described in that case are not applicable.

The results of the intervening non-supervised election clearly demonstrate that the evil sought to be remedied by the Secretary's supervised election, i.e., to dispel any unfair advantage obtained by the incumbents from the election under attack in the Secretary's lawsuit, does not exist in this case.

The results of this intervening election, which were obtained during the recount of all of the Offshore Division votes held on January 18, 1975, show that the large majority of the O'Callaghan slate have lost the election, and that Captain O'Callaghan, himself, running for re-election, has barely succeeded in getting enough votes to be in a run-off for the Presidential office. His chief opponent, Frank Scavo, received slightly less than 40% of the votes, with Captain O'Callaghan behind him with about 36% of the votes. Pursuant to the

International Constitution, it is necessary that candidates for the International offices receive 40% of the vote, in order to be elected. In the race for President, Captain O'Callaghan was opposed by five other persons, but he will now be in a run-off only with the front-runner, Frank Scavo.

In addition, Captain William Caldwell, the incumbent Vice-President, running for reelection on the O'Callaghan slate for Vice-President, is also involved in a run-off. Only Captain Lowen, the third of the incumbents, gathered the necessary 40% to be reelected.

In addition, the following O'Callaghan slate candidates have lost their bids for reelection in the interving election:

New York Port Agent - Vice-President (Atlantic)

Joseph B. Gaier, the incumbent on the O'Callaghan slate lost to Charles A. Hemming, one of the complainants to the Secretary of Labor in the 1971 election.

Galveston Port Agent - Vice-President (Gulf)

Robert L. Jones, the incumbent on the O'Callaghan slate lost to Arthur Holdeman.

New York - Executive Assistant Port Agent

Richard J. Polachek, an incumbent in a different office and on the O'Callaghan slate, lost to Henry L. Nereaux, one of the complainants in the 1971 election.

Baltimore - Port Agent

Morris Weinstein, the incumbent on the O'Callaghan slate lost to James P. Hopkins.

Norfolk - Port Agent

William K. Beach, the incumbent on the O'Callaghan slate lost to Edward W. Simmons.

Mobile - Port Agent

Francis E. Kyser, the incumbent on the O'Callaghan slate, lost to Walter J. Anderson.

Assistant Port Agent - Port Arthur, Texas

James R. Giblin , the incumbent on the O'Callaghan slate, lost to Ford Cummings.

Houston Port Agent

Robert N. Palumbo, the incumbent on the O'Callaghan slate, lost to Paul S. Wilkins.

Wilmington, California Port Agent

Henry C. Walther, the incumbent on the O'Callaghan slate, lost to Frank Burke.

San Francisco - Executive Assistant Port Agent

George M. Tuttle, the incumbent on the O'Callaghan slate, lost to William F. White.

Portland Port Agent

Charles W. Wallace, the incumbent on the O'Callaghan slate, lost to James Haberfield.

In addition to such broad sweep loss by incumbents running for re-election, Patrick J. King, who was elected Port Agent, Port of Boston, on the O'Callaghan slate in 1971, did not run for re-election for that position, and consequently is out of office. John Beirne, who was elected Port Agent for the Port of Providence on the O'Callaghan slate in 1971, has retired and did not run for re-election. Henry J. Stegall, who was elected Port Agent, Port of New Orleans, in the 1971 election on the O'Callaghan slate, has retired and did not run for re-election. John Handley, who was elected Port Agent, Port of Philadelphia, on the O'Callaghan slate, has retired and did not run for re-election.

Significantly, the foregoing results show that with respect to the two Vice-Presidencies, Atlantic and Gulf, of the Offshore Division, which are under specific attack by the Secretary, the incumbent O'Callaghan slate candidates were both defeated. Charles Hemming, who could fairly be classified as one of the major complainants to the Secretary of Labor about the 1971 election, has, in this intervening election, now been elected as the Port Agent for New York and Vice-President, Atlantic.

Arthur L. Holdeman, another anti-O'Callaghan candidate, is now the Offshore Division Vice-President, Gulf. He and Hemming are now both on the International's General Executive Board.

Henry Nereaux, who might also be fairly described as another major complainant in the 1971 election, has been elected to office for the second highest New York position, that of the Executive Assistant Port Agent, defeating the O'Callaghan slate candidate, Richard J. Polachek.

And most significantly, Lloyd Sheldon, who was perhaps the third major complainant in the 1971 election and who opposed O'Callaghan for the Presidency in the 1971 election, had previously retired and was not a candidate in the intervening 1974 election. Therefore, the political rivalry between O'Callaghan and Sheldon and the whole issue over the alleged anti-Sheldon campaign literature had come to an end long before the 1974 election, and therefore no longer remains in the picture as something which the Secretary needs to correct or be concerned with.

And, of course, a new election ordered by this Court could cause a compounded mischievous result. The O'Callaghan

slate candidates who have lost in the intervening election could have a chance to run again and possibly this time be the victors. The defeated anti-slate candidates could then argue that the Secretary's election was itself a tainted election, since it might have implied to the membership that there was something wrong about the 1974 intervening election in which the anti-slate candidates had been elected, and it was for that purpose that the Secretary granted the right to conduct his own new election. The medicine of the Secretary's election could prove more harmful than the alleged sickness which it might seek to remedy.

Further, to attempt to rerun the 1971 election under the then-existing conditions and provisions of the Constitution and By-Laws would be an impossibility. To wind back the clock and try, at this time, to figure out what the membership of any particular local is, would be a futile endeavor. Moreover, none of the anti-O'Callaghan slate wishes to return to the Local setup for elections, which would be the case if the 1971 election were to be rerun under the provisions of the Offshore Division By-Laws then governing.

Other procedural infirmities which the Secretary of Labor objected to in the transitional election, were not present in this intervening election. The "disenfranchisement" problem complained about with respect to the Offshore Division Vice-Presidencies has disappeared. As stated previously, all Offshore Division members were eligible to be candidates for all Offshore Division offices, and, correspondingly, all Offshore Division members voted in all Offshore Division races. Moreover, the O'Callaghan slate candidates have lost the two Vice-Presidencies in question.

A second issue raised in the transitional election also vanished in this intervening election. Under the new Constitution and Offshore Division By-Laws, no one was permitted to obtain physically a copy of any membership list, and no one has made a challenge claiming such entitlement.

The other argument in the last election that the balloting did not take place within 30 days after the close of nominations, is not a problem in the intervening election, and no candidate has alleged any such violation.

The other issues raised in the Secretary's complaint, such as the failure to count non-postmarked ballots and the failure to send ballots to former Local 47 members--all of which will be discussed later dealing with our alternative motion for a partial summary judgment for dismissal--did not arise during the intervening election.

One final word on mootness and the facts and circumstances of the intervening election. The taint of unfair advantage clearly was not present in the intervening election, as shown by the results set forth above. The only result that would come from a new election under the supervision of the Secretary would be a drain on the Union's treasury. The costs incurred thus far in conducting the 1974 intervening election are well in excess of $45,000. (My best estimate is that the ultimate cost will be close to $90,000.) To require another election, designed to theoretically cure a defect which in fact does not exist, would ill serve the interests of the members of the Union and the Union's treasury. It is clearly within the law and the sound discretion of the Court not to order a new election under the supervision of the Secretary of Labor.

The scrupulous work and effort already done by the Union in conducting the intervenirg election, as well as the additional work and preparation for the upcoming run-off of the top positions, would all come to naught if a new election were now to be ordered. Such a procedure would be basically injur-

ious and unfair to the membership of the Union. 1812a

From all of the foregoing, therefore, it is respectfully urged that the plaintiff's complaint be dismissed.

On the grounds urged above, the Union has independently moved for summary judgment dismissing the entire complaint of the Secretary of Labor. Alternatively to such motion, the Union moves for summary judgment dismissing certain allegations of wrongdoing set forth in the complaint, which were not urged upon the Secretary's motion for summary judgment.

POINT I. THE THREE INTERNATIONAL OFFICERS BY REASON OF SUCH POSITIONS, ALSO BECAME THE EXECUTIVE OFFICERS OF THE UNION'S OFFSHORE DIVISION

The International Constitution, ratified by the membership of the entire union, states that the three International officers shall, by dint of such position, also be the executive officers of all fully formed Divisions. The Union's Offshore Division is one such fully formed Division.

By raising a complaint about this provision of the Constitution, the Secretary of Labor, is in effect, condemning every Union which aspires to be or is national in scope. Such a proposition is unheard of and there is no case on record which supports this broadside attack on the internal workings and structure of a Union.

The vast majority of unions within the labor movement, contain some sort of pyramid structure. That is, they start at a "Local" level, wherein, pursuant to the LMRDA, the members of a local vote directly for their "local" officers. Thereafter, going up the structure, there are myriad ways in which the officials on the intermediate levels or top levels, of the parent organization are selected. This may be by delegate vote,

or by direct vote of an expanded electorate.

In all such cases, this higher echelon of union officials always maintains and exercises control and direction in varying degrees over the membership of the subordinate bodies. Yet, under such a structure, no single subordinate body by and of itself can determine who it is that will be in the second or higher echelon of leadership. These upper-level leaders are selected from a broader base electorate than any one single local.

Never has such a pyramid setup been condemned by any Court, nor does the law (enacted when such pyramid structures of union organization were well known) compel or even hint that such a pyramid structure is illegal.

Under the Secretary's theory, only those union officials who are popularly elected by the smallest units of members can have any say in the affairs of such small local membership. This would cause a complete fragmentation of the union movement, and would wind back the clock to the 19th Century when the union movement was in its embryonic stages.

Moreover, it would fly in the face of other legislation which clearly contemplates this pyramid type arrangement, such as the provisions of 29 U.S.C. Section 461, et. seq., governing trusteeships. There, parent organizations are clearly recognized to have power over their subordinate organizations and to participate in the activities of such subordinate organizations.

In the case of the Masters, Mates and Pilots, democratic voting procedures are in fact followed which are in excess of those required by Federal legislation. That is, not only are the divisional officers elected popularly, but the

International officers themselves are also voted for by membership ballot rather than by delegate election, as would be authorized under 29 U.S.C. Section 481 (a). 1815a

Aside from the basic incorrectness of the Secretary's position, the actual structure and makeup of the governing body of the Offshore Division further shows the Secretary's complaint to be without merit.

The governing body of the Offshore Division is its Offshore Division Executive Council, which is composed of the three International officers, along with 14 elected port agents from the various ports comprising the Offshore Division. Decisions of the Offshore Division Executive Council are made by majority vote. Each member has one vote.

It is this Offshore Division Executive Council which as described in its By-Laws, controls the activities of the Division and its membership. Article IX, Section 2(b), states

> "Section 2(b). The Offshore Division Executive Council shall have the authority to consider and act on any and all matters affecting the Offshore Division."

All decisions and activities which are vital to the Offshore Division are directly made either through this entire Offshore Division Council, or by some other broad-based body composed solely of Offshore Division members or representatives as described in the Division's By-Laws.

It is this Council which designates the union trustees to the jointly administered pension welfare and vacation plans, and it is similarly this Offshore Division Council which has the authority to close ports.

As another example, Article X, Section 2, describes the makeup of the negotiating committee which deals with the life-blood of the Union-the contracts under which the members work. Such Negotiating Committee consists of 26 persons, with the three International officers constituting a very small percentage of the whole. This committee acts by majority vote, and it is this committee alone which has the authority to call a strike against an employer or employers, and it is similarly by majority vote of this committee that a proposed contract can be presented to the membership for referendum ballot.

In further support of this allegation of wrongfulness, the Secretary has referred to Article VII Section 1 of the Constitution which provided that votes on the Union's General Executive Board were based on the average membership of the subordinate body that a Board member represented and that the three International officers on the General Executive Board, authorized to cast one-half of the votes of the Offshore Division, would thereby gain an inordinately powerful role on the General Executive Board. The Offshore Division represents about 67 % of the entire membership.

Moreover, as executive officers of the other fully formed divisions, they might also have had additional voting strength from those other Divisions. Thus, the International Officers under the provisions cited by the Secretary could conceivably have had over 50% of the vote on the General Executive Board.

Assuming, arguendo, some substance to the Secretary's contention at the time it was made, this charge is no longer in the picture. The membership of the Union has amended Article VII,

Section 1 of the Constitution to provide that each member of the General Executive Board shall cast only one vote, irrespective of the number of members in the subordinate body he represents.* As currently constituted, therefore, the Union's General Executive Board now consists of the following:

International President
International Executive Vice President
International Secretary-Treasurer
Offshore Division Vice President - Atlantic
Offshore Vice President - Gulf
Offshore Vice President - Pacific
Pilots Vice President
Executive Officer-Inland-Atlantic and Gulf Region
Executive Officer-Inland-Pacific Region
Executive Officer-Local 30
Executive Officer-Local 27

Thus, under the new provisions of the Constitution the three International officers will have only 27% of the vote, and if the International President acts as Chairman of the General Executive Board, and does not vote except to break a tie, then the International Executive Vice President and the

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*The old section reads as follows:

ARTICLE VII. GENERAL EXECUTIVE BOARD
Section 1. Voting Procedure

a) The vote of each member of the General Executive Board shall be based on the average membership for which dues were paid by his subordinate body into the Organization during the four quarters preceding each General Executive Board Meeting.

The votes of the Offshore Division shall be equally divided among the individuals representing the Offshore Division; namely, International President, International Executive Vice-President, International Secretary-Treasurer and the three Offshore Vice-Presidents.

*The new section reads as follows:

ARTICLE VII. GENERAL EXECUTIVE BOARD
Section 1. Voting Procedure

a) Each member of the General Executive Board shall have one vote and a majority of the votes cast at any meeting of the General Executive Board shall be necessary to adopt any resolution.

b) A majority of the General Executive Board members shall constitute a quorum.

International Secretary will have only 20% of the vote of the General Executive Board between them.

It is respectfully submitted, therefore, that on all counts, this allegation of illegality is baseless, and summary judgment dismissing such allegation from the complaint of the Secretary should be granted.

POINT II. NO BALLOTS WERE SENT TO MEMBERS OF FORMER INLAND LOCAL 47

Little need be said in support of the motion dismissing this allegation from the Secretary's complaint. It is based on an allegation that at the time of the 1971 balloting, members of former Inland Local 47 were in fact members in good standing of the International, and consequently, should have received ballots to vote in that election. In fact, they were not sent ballots by reason of the fact that they were not members in good standing.

In the background material presented earlier, we have set forth the referendum by which the membership of Local 47 voted to disaffiliate from the Union. Such disaffiliation came into effect on October 1, 1970, when the new Constitution became effective, and prior to the balloting in the 1971 election. At no time did the membership vote to rescind such disaffiliation, nor did they at any time vote to re-enter the MM&P.

As also referred to previously, a lawsuit was commenced in this United States District Court for the Southern District of New York by Vincent Larcombe, a former Vice-President of Local 47, seeking to set aside the ILA affiliation referendum which took place commencing in August, 1971, a month before the election of officers.

The gravamen of that lawsuit was identical to the claim made by the Secretary with respect to the Local 47 members; that at the time of the referendum ballot on the affiliation, Local 47 members were members in good standing of the MM&P; that they had been denied the right to participate in the affiliation referendum; that such improper denial may have affected the outcome of the affiliation referendum; and that therefore the referendum vote should be set aside.

Extensive discovery was conducted in that lawsuit. Mr. Larcombe was examined and testified that at no time did the membership vote to reaffiliate with the MM&P or revoke the resolution of this affiliation. In fact, no dues had been paid on behalf of Local 47 members to the MM&P for more than six months prior to the election, and consequently, in accord with the Constitution, such members, in any event, stood suspended.

After extensive discovery, the Union brought on a motion for summary judgment dismissing the complaint, based on the fact that Local 47 was not in fact a part of MM&P after October, 1970.

On February 4, 1974, the Honorable Marvin E. Frankel issued a memorandum opinion which commenced as follows:

> Frankel, D.J.
>
> "Defendant presents a powerful motion for summary judgment. Out of the enormous caution with which we are schooled to treat such motions, it will not be granted at this time. As indicated herein, however, the question will be reconsidered within a few months from now, after plaintiff has had ample time to show concrete

grounds of opposition which are adumbrated but scarcely presented now." 1820a

Judge Frankel went on to point out that from the matters presented to him on the motion for summary judgment, there was no visible support for the plaintiff's contention that Local 47 was in the MM&P in August 1971. Judge Frankel's over-abundance of concern related solely to one point made in the papers submitted in opposition to the motion-and that was, that the plaintiff wished to depose Captain O'Callaghan, alleging that evidence thus obtained "will or may" reveal that there was a triable issue as to whether there was reaffiliation at a material time. Judge Frankel was hardly overwhelmed by this argument, and with respect to it stated as follows:

> "The only point that serves (if barely) to avoid the judgment defendant seeks is the claim that plaintiff has sought, but has thus far not had, the deposition of the International President and the accompanying suggestion that evidence thus obtained will or may reveal that there is a triable issue as to whether there was reaffiliation at a material time. This submission is not imposing; the court is frankly skeptical that discovery will reveal the now missing ground for this action. Nevertheless, given the familiar animus against judgment without trial where something may yet turn up to be tried,

> the court will allow a reasonable time for plaintiff to have discovery and attempt to buttress meaningfully his opposition to the instant motion."

Counsel for plaintiff, apparently acknowledging the futility of even this last chance offered by Judge Frankel, not even bothered to take the testimony of Captain O'Callaghan, but, rather, on May 1, 1974 entered into a stipulation discontinuing the action with prejudice. Annexed hereto as Exhibit B is a copy of such stipulation.

Another lawsuit was also brought in the United States District Court for the Northern District of Ohio, Eastern Division which also involved the question of the status of Local 47, vis a vis the MM&P after October 1970. This suit was also dismissed with prejudice, no finding having been made that Local 47 was affiliated with the MM&P after October 1970. Attached hereto as Exhibit C is a copy of such dismissal.

Naturally, there is no claim that Local 47 members would now be entitled to vote, and in the 1974 election no such claim has been made.

From the foregoing, it is clear that no violation was committed by reason of the failure to send ballots to former Inland Local 47. Summary judgment dismissing this allegation from the Secretary's complaint should be granted.

POINT III. NON-POSTMARKED BALLOTS WERE NOT BEING COUNTED

A challenge was made to the International Ballot Committee by a number of candidates opposing O'Callaghan and the O'Callaghan

slate protesting the counting of any ballots that were in envelopes not bearing a postmark. Such challenge apparently was based on some supposition that any such non-postmarked ballot must have been surreptiously "stuffed" into the ballot box, and therefore were not validly cast by an organization member. In response to such challenge, the International Ballot Committee ruled that such non-postmarked ballots would not be counted, finding authority for such ruling in the International Constitution.

There were some 700 of these non-postmarked non-counted ballots in all.

After the final tabulations were in, the losing candidates, who earlier had challenged the non-postmarked ballots, now changed their position and filed a complaint with the Secretary of Labor charging that these non-postmarked ballots should be counted, since the failure to do so disenfranchised those persons who had sent them in.

The question of whether the International Ballot Committee's ruling not to count the non-postmarked ballots was in accordance with the International Constitution, need not be reached on this issue, since the failure to count these non-postmarked ballots did not affect the outcome of any of the elections.

In its discovery proceedings, representatives of the Secretary of Labor did in fact open these non-postmarked ballots and tallied the results. At the deposition of Brian O'Hanlon, the Secretary of Labor's agent who was in charge of the tally of these non-postmarked ballots, he testified that the failure to count such ballots did not affect the outcome of any election.

That is, by adding the non-postmarked ballots to the total shown on the AAA certification of results (Exhibit M to plaintiff's 9(g) Statement) no change was made in the results of any election.*

Therefore, in view of the fact that the failure to count these ballots did not affect the outcome of any election, summary judgment should be granted dismissing this allegation from the plaintiff's complaint.

Point IV. THE MEMBERSHIP LISTS WERE MAINTAINED FOR INSPECTION AND WERE AVAILABLE TO CANDIDATES AT THE AAA'S OFFICES IN NEW YORK, RATHER THAN IN EACH OF THE PORTS

The Secretary bases this claim (see his Memorandum Page 109) on the fact that Captain O'Callaghan had "announced" that membership lists would be available for inspection in Local ports. Such announcement by Captain O'Callaghan, however, was not an announcement by the International Ballot Committee, who pursuant to the Constitution and By-Laws, was the only body authorized to supervise the election. Moreover, such O'Callaghan announcement was made before the Ballot Committee was elected at the International Convention.

The decision subsequently made by the International Ballot Committee to permit inspection of the membership lists only in New York was a reasonable one and not violative of any provision of the Constitution or the By-Laws. The issue of the sanctity of mailing lists was of substantial concern to the

* This issue is not present in the 1974 election just held.

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International Ballot Committee. As described previously, the MM&P at this time was under intensive attack by the Marine Engineers Beneficial Association with respect to primacy of the licensed deck officers aboard the vessels, and, more directly, by a frontal attack on the traditional jurisdiction of the MM&P in their representation of such deck officers. They were ardently campaigning against the affiliation with the ILA. An MM&P mailing list in the hands of these enemies would be a powerful tool.

It was for this reason, among others, that the International Ballot Committee ruled that the membership lists would be made available only in New York, at the offices of the AAA, where its security could be maintained. Such availability was fully within and met the requirements of 29 U.S.C. §481.

Further, such a procedure was within the proper authority of the International Ballot Committee to declare. Additionally, it in no way discriminated against any candidates, nor affected the outcome of the election.

The slates and candidates in opposition to the incumbents had numerous representatives in the Port of New York, and, in particular, their counsel, Burton Hall. Inspection of these lists could have been made by any such candidates' representative, and, in fact, examinations by candidates opposing the O'Callaghan slate were made.

The equal access to the membership lists in the New York office of the AAA violated no provision of the Union's Constitution or their By-Laws. Such procedure did not affect the outcome of the election, and consequently summary judgment dismissing this allegation from the Secretary's complaint should be granted.

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POINT V. THE DISTRIBUTION OF CAMPAIGN LITERATURE WAS MADE THROUGH THE AAA OFFICE IN NEW YORK RATHER THAN IN EACH OF THE PORTS

This is a companion complaint to the one above dealing with the membership lists being available only in New York and, is equally without merit.

It was for the same reasons of security of the membership lists that the International Ballot Committee, properly within their authority, directed that all mailings be done through the AAA office in New York.

No provision or law or the Union's Constitution or the By-Laws required anything to the contrary. This was a reasonable decision of the International Ballot Committee and in no way discriminated against any of the candidates for office in any particular port. All canidates - whether they were incumbents or insurgents were obliged to use the mailing service through the office of the AAA in New York.

Minutes of the Ballot Committee relating to this decision have been furnished to the Secretary of Labor. Such decision reflected in the minutes of August 31, 1971, reads as follows:

> "Mrs. Carlson and Mr. Tannenbaum of the American Arbitration Association joined the meeting at 1525 hours. There was a discussion of the use of mailing services for the distribution of campaign literature by candidates. It was decided that the confidential nature of the

> Union's address list could not be protected if the lists were available to numerous commercial mailing services. Also, costs to the candidates could vary significantly from one city to another. Motion was made, seconded and adopted to use the American Arbitration Association as the independent mailing service for the distribution of campaign literature. A further motion was made, seconded and adopted that the AAA promptly notify each candidate for office of the procedures, cost and other necessary information for the mailing of literature and that each candidate be given an opportunity to mail literature prior to the mailing of ballots."

In fact such notice was promptly sent by the AAA to all of the candidates on an equal, non-discriminatory basis.

This procedure adopted by the International Ballot Committee was entirely proper, violated no law or provision of the Union's Constitution or By-Laws, and did not affect the outcome of the election. Summary Judgment should be granted dismissing this allegation from the Secretary's complaint.

CONCLUDING REMARKS

In this affidavit and the other papers which accom-

pany it, the Union has shown that the five grounds urged by the Secretary on his motion for summary judgment are without substance. Wholly apart from that, the Secretary's motion, based on only the few alleged grounds, and remaining silent on other alleged violations claimed in its complaint, is fatally defective.

If the Court finds for the Secretary in a case of this type, it can declare the election under attack void and direct the conduct of a new election under supervision of the Secretary, and "so far as lawful and practicable, in conformity with the Constitution and By-Laws of the labor organization." 29 U.S.C. §482(c).

Plaintiff in his memorandum on this motion and in his complaint alleges other violations relating to the Union's Constitution and By-Laws. Without passing on these other alleged violations, a summary judgment motion is incomplete and inconclusive since no court ruling has been made on the legality of the Constitution and/or By-Laws provisions to be followed in the supervised election.

Such a procedure would lead to a proliferation of litigation and an inconclusive result from the supervised election. That is, a candidate who lost in the supervised election could turn around and complain about that election on the basis of a carry-over provision of the Constitution or By-Laws which had been claimed originally to be violative of law, but which was not the subject of a ruling by the Court. This potential for continued litigation was never intended, and would defeat the finality of result that a supervised election was designed to accomplish.

If the Secretary brings a motion for Summary Judgment, he must present it on every allegation of wrongdoing which he set forth in his complaint, or, if not, he must specifically abandon his claims with respect to any alleged violations not discussed. This would be exactly the situation at trial. The Secretary, were he to proceed to trial on the merits, could not split his causes of action and say "I will try the case on point A, B and C and later on I will ask for another trial on D, E and F." There must be a completeness of decision at one time so that the remedy of a new election under the supervision of the Secretary, can also be complete without the possibility of additional unresolved violations being alleged after such election is over.

UNION'S INDEPENDENT MOTION

The intervening election and the circumstances revealed from that election, has rendered the Secretary's lawsuit, in this particular case, moot. Since the rationale for ordering a new supervised election stated in the Glass Bottle Blowers case is not present here, this Court, in its discretion, should dismiss the complaint of the Secretary.

Alternatively, if the entire complaint is not dismissed, summary judgment dismissing those specific allegations to which the union has cross-moved and independently moved should be granted.

WHEREFORE, the Union respectfully requests that the plaintiff's motion for summary judgment be denied and the

Union's motion for summary judgment be granted.

1829a

MARVIN SCHWARTZ

Sworn to before me this

2nd day of January, 1975.

NOTARY PUBLIC

EILEEN M. LEFEBURE
Notary Public, State of New York
No. 31-4600434
Qualified in New York County
Term Expires March 30, 1976

Exhibit A,B,C,

Annexed to Affidavit of Marvin Schwartz

In Support of Motion for Summary Judgment

Longshoremen, Seamen Unions Merge

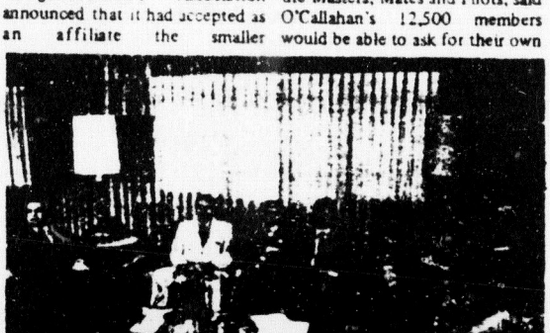
Combined Labor Force Of 128,500

1830a

The masters and mates of the U.S. merchant marine tossed in their lot with the men who load and unload the vessels, forming a new and powerful 128,500-member labor force.

The International Longshoremen's Association announced that it had accepted as an affiliate the smaller separate AFL-CIO unions. Gleason said, the ship owners and operators can now do in one package what they had been accustomed to facing twice over.

While both Gleason and Capt. Thomas O'Callaghan, president of the Masters, Mates and Pilots, said O'Callahan's 12,500 members would be able to ask for their own



Announcing the merger, Left to Right: Captain Joseph B. Geier, V.P. Masters, Mates & Pilots; Capt. Thomas O'Callahan, Pres. Masters Mates & Pilots, Thomas W. Gleason, Pres. International Longshoremen's Assn., John Bowers, Exec. Vice President; Fred R. Field, Jr., General Organizer.

International Organization of Masters, Mates and Pilots.

THE result, according to ILA president Thomas W. Gleason, will be "stability to the industry and greater profits" to the ever-shrinking number of U.S. merchant fleet operators.



Left to Right: James T. Murock, Landon L. Williams, Thomas A. Gleason, Dave Alston, Capt. O'Callahan and John Bowers.

Instead of bargaining with two contracts and terms, there was no doubt Gleason and his 116,000 longshoremen would have the final say as to any strike.

The advantage to the ILA, Gleason said, would be a unified front by the men who load the vessels and those who operate them.



Left to Right: John Bowers, Thomas W. Gleason, George Dixon, Capt. Thomas O'Callahan, Capt. Joseph B. [illegible] and William H. Hopkins.

THE ADVANTAGE to the Masters and Mates, O'Callaghan said, would be the support of the dockworkers who unless they put cargo aboard ships, making sailings unnecessary.

Captain O'Callaghan said, "At our last three conventions Teddy Gleason and Johnny Bowers [the ILA's executive vice president] have been our honored guests.

"My people work with the longshoremen all the time. . . Our problems are the same, mechanization and modern technology."

Gleason, whose ILA has contracts in every Great Lakes and coastal port except those from Vancouver to Los Angeles, said his men would continue to refuse to handle Soviet vessels because their operators don't keep their word as to pay schedules.

Mr. Gleason said the decision of the mates union to affiliate with the ILA would be beneficial for the American-flag merchant marine.

"It is best for the industry for such mergers to take place," he said. "It means there will be less whip-sawing in the industry."

Captain O'Callaghan, will continue to head his union as president of the marine division, echoed Mr. Gleason, saying, "This could be the start of real stability in this industry."

Referring to the fact that the merger will mean he is no longer president of an independent union on the waterfront with no said, "I had to give up a crown, but I was willing to do it in the interests of the industry and my membership.

"If there is going to be stability in the merchant marine the ILA is the one union that can achieve it," he added. "The only union on the waterfront with an ax to grind is the ILA."

Anticipating the reaction of a number of industry officials to the announcement, Captain O'Callaghan asserted, "I don't want any more horsepower [in dealing with management] . . . All I want is stability."

The initial reaction of both union and management leaders - none of whom wanted to discuss the announcement publicly - was one of concern.

"It is an incongruous amalgamation," one steamship executive said. "I don't see how it will really provide greater stability. "A merger between the deck officers and the marine engineers would have been more logical, except for the personalities involved, and it would have contributed to stability by giving the companies one major licensed officers union "to deal with."

Strengthens Both

"It gives both of them greater strength," another shipping official said.

"It assures the MM&P of the longshore support if they get in another beef like the one with Prudential, and, if Gleason has a strike this fall, the ILA's power will be extended to the West Coast through the mates."

A union official said, "It looks less like a move to provide stability than a matter of choosing up sides," a reference to the fact that, in its bitter dispute with Prudential-Grace earlier this year, the officers' union received support only from the longshoremen.

Alluding to the hostility with which other seagoing union leaders have regarded Captain O'Callaghan in recent months, one close observer of maritime affairs said the announcement demonstrated the president of the mates union "has good animal instincts for survival."

The ILA for the past several years has been plagued by the increasing number of so-called "containerized ships" in which cargo is not loaded by innumerable small bundles but in huge crates prepared before they ever reach dockside. The containers are transferred to and from ships by crane.

As a result, the number of man hours needed and the number of men employed to load a vessel are diminishing.

The Masters and Mates at the same time, have found their talents needed less and less as shipping companies turn to more sophisticated vessels that need fewer deck personnel because of electronics and simplified operation.



Landon L. Williams, President Local 1408, Jacksonville, Fla. shaking hands on the merger with Capt. O'Callahan.



Left to Right: Dave Alston, International Vice Pres., congratulating Capt. O'Callahan on the merger.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

1831a

VINCE LARCOMBE and all others similarly situated,

Plaintiffs,

-against-

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARINE DIVISION OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Defendant.

----------X

73 Civil 1789 MEF

STIPULATION DISCONTINUING ACTION

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, the attorneys of record for plaintiffs and defendant in the above entitled action, that whereas no party hereto is an infant or incompetent person for whom a committee has been appointed and no person not a party has an interest in the subject matter of the action, the above action be, and the same hereby is discontinued, WITH PREJUDICE without costs to either party as against the other. This stipulation may be filed without further notice with the Clerk of the Court.

Dated: New York, New York
May 1, 1974

SEYBERT & SEYBERT

By John R. Seybert
Attorneys for Plaintiffs

MARVIN SCHWARTZ

By Marvin Schwartz
Defendant Co-Counsel

WALDMAN & WALDMAN

By Seymour Waldman
Defendant Co-Counsel

"B"

Exhibit B

FILED
NOV 27 10 04 AM '73
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

1832a

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS	:	NO. C 71-505
	:	JUDGE THOMAS D. LAMBROS
Plaintiff	:	
vs.	:	
INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, LOCAL NO. 47, ALSO KNOWN AS LOCAL 47, GREAT LAKES AND RIVERS DISTRICT	:	STIPULATION OF DISMISSAL WITH PREJUDICE
Defendant	:	
and	:	
ROLLA R. JOHNSON	:	
Defendant	:	

I hereby certify that this instrument is a true and correct copy of the original on file in my office.
Attest: Caroline J. Clemens, Clerk
U. S. District Court
Northern District of Ohio
By: _____
Deputy Clerk

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys for the respective parties that the above-entitled action, including the Complaint, Cross-Claim and Counter-Claim, be and hereby are dismissed with prejudice as to each party, each party to pay own costs. No record.

Dated: November 27, 1973

IT IS SO ORDERED:

Thomas D. Lambros
U. S. DISTRICT JUDGE

T. D. McDONALD
McDonald, Hopkins & Hardy
1105 East Ohio Building
Cleveland, Ohio 44114

Attorney for Plaintiff
International Organization of
Masters, Mates and Pilots

Attorney for Defendant
International Organization of
Masters, Mates and Pilots, Local
No. 47, also Local 47, Great Lakes
and Rivers District

STANLEY M. [illegible]
1500 Terminal Tower
Cleveland, Ohio 44113

Attorney for Defendant
Rolla R. Johnson

HOWARD [illegible]
1248 Standard Building
Cleveland, Ohio 44113

"C"

Exhibit "C"

Affidavit of Thomas W. Gleason

In Opposition

To Motion for Summary Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JAMES D. HODGSON, Secretary of Labor
United States Department of Labor,

Plaintiff,

72 Civ. 5031 (CBM)

-against-

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

AFFIDAVIT

Defendants.

----------x

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

THOMAS W. GLEASON, being duly sworn, deposes and says:

1. I am the President of the International Longshoremen's Association AFL-CIO. I am making this affidavit in opposition to plaintiff's motion for summary judgment.

2. One of the grounds rests on remarks made by me to a Convention of the International Organization of Masters, Mates and Pilots in Galveston, Texas. The purpose of this affidavit is to set forth the setting of those remarks, the reasons why I said what I did and the irrelevance of those remarks to the election issues which are the subject of this lawsuit.

3. At the time, there was pending before the IOMM&P a proposal that the organization affiliate with the ILA. As President of the ILA and as a trade unionist interested in the welfare of the maritime industry and the employees who

serve it both on ship and offshore, I was strongly in favor of that affiliation. I felt then as I do now that the longshoremen would gain immeasurably from the affiliation of a strong well-organized sea-going union and that the Masters, Mates and Pilots on their part would gain from affiliation with the largest and strongest shore-side maritime union.

4. The proposed affiliation was a principal topic considered at the Texas Convention at which I was a guest speaker. My speech was directed to the issue of affiliation with which I was concerned and with which the delegates to that Convention were equally concerned. It did not deal with the forthcoming election within the IOMM&P. It was not a campaign speech for any candidate or prospective candidate in that election.

5. My remarks moreover were not discussed in advance with the incumbent officials of the IOMM&P. They were not dictated by the IOMM&P. They were not cleared with the IOMM&P. They came from my own heart.

When I made these remarks as appears from the language which I used and which is a part of plaintiff's Exhibits in this motion, I was deeply and sincerely outraged at the propaganda being circulated in opposition to the affiliation. I had seen this propaganda literature and I was personally aware of its contents.

6. Much of this literature was blatantly racist in content. The ILA, I must explain, is a fully integrated labor organization. Although we do not keep records on a racial basis, it is my estimate, based on familiarity with the ILA membership that it is probably over 50% black. Moreover, blacks occupy a conspicuous role in the ILA officialdom.

A large number of local officials and also International Vice Presidents are black. In many ports the principal officials at both the National and local level are black.

The literature that I had seen attempted to play on racist fears by indicating clearly that if the IOMM&P affiliated with the ILA it was likely to become dominated by a black controlled International union. At least one piece of literature that I recall, showed Captain O'Callaghan, President of the IOMM&P with two black Vice Presidents of the ILA. It was accompanied by obvious and pointed language. This tactic / Unfortunately, familiar to American political life, as well, was plainly directed at the fears of some IOMM&P members

7. Other literature opposing the IOMM&P affiliation with ILA was equally false and to my own knowledge. One oft repeated charge was that the ILA wanted to take over the IOMM&P contracts and pension and welfare funds. As President of the ILA I knew that this was absolutely untrue. Parenthetically, I might add that the more than three years of events since the affiliation have proved this to be a false charge. ILA has neither taken over nor sought to take over contracts, pension or welfare funds or anything else that has historically been administered or held by the IOMM&P. In addition, I had reliable information which I have every reason to believe to be accurate that much of the opposition literature was financed by rival labor organizations who at that very time were seeking to raid the IOMM&P and strip it of its jobs and contracts. One of the very purposes of the affiliation of IOMM&P with ILA was to help the IOMM&P thwart these raids. It seemed to be particularly reprehensible for members of the IOMM&P to

ally themselves with opposition unions in an attempt to defeat an affiliation designed to secure the IOMM&P jurisdiction and to protect the jobs of its working members.

8. It was in this context that I made the remarks that I did at the Texas Convention of the IOMM&P. The text of these remarks will bear out the considerations which I have outlined above.

9. In only one or two sentences did I refer without mentioning names to Lloyd Sheldon. In doing so, I was not taking a gratuitous swipe at Captain Sheldon because he was a proposective candidate for union office. I was directing myself to the affiliation issue and that issue alone and Captain Sheldon's position on that issue.

10. Captain Sheldon, it will be recalled, spoke directly to this issue at the very same Texas Convention which I was addressing. He was the sole delegate at that Convention to oppos e affiliation. His opposition was fresh in my mind and in the minds of the delegates. I felt then as I feel now that when a union delegate addresses himself to an issue then he may be criticized by others legitimately interested in that same issue and that his views are subject to criticism. In short, Captain Sheldon was entitled to address himself to the issue of affiliation but his pending candidacy for union office did not render him immune from counter-criticism on that very same affiliation issue, and that is all I was doing.

I was particularly outraged at Captain Sheldon's remarks because he was a former International President and should have known that the views being expressed in opposition

to the affiliation were phony and against the best interests of the IOMM&P. As a former International President he should have known, as I know he did, about the raids being conducted by opposition unions who were financing and supporting the attack on the proposed affiliation. As a former International President sophisticated in organizational matters, he undoubtedly knew the source of the financial support for the anti-affiliation literature. And to top it all, here was a man who was trying to thwart affiliation designed to protect the jobs of IOMM&P members when he himself no longer had a stake in these jobs. For Captain Sheldon had already retired on pension and he had nothing to lose if IOMM&P jurisdiction rivals succeeded in raiding IOMM&P jobs. It was the other members who stood to lose.

Again, my remarks at the Texas Convention quoted in the Exhibits on this motion will bear out my awarness of these considerations which related not to election or campaign issues but solely to the issue with which I was concerned and on which Captain Sheldon had just taken a strong public position.

I should add only one final point. I have described the nature of the literature in opposition to the affiliation. I wish to point out that Captain Sheldon's own literature demonstrated that he chose to ally himself with those who were distributing other types of opposition literature. Neither he nor those who in this litigation are speaking on his behalf can disavow this fact. For example, the very first document in Exhibit MM, a bulletin signed by Captain Sheldon himself, talks in its second paragraph about the "concerted and unified opposition by MDU, West Coast Mates Committees, Ashley Gordon's

RAFT and other Rank and File groups within MM&P". Plainly, Captain Sheldon chose to ally himself with the groups that were distributing the racist and opposition union material. To comment on this fact was not to engage in electioneering or campaigning but to direct the attention of IOMM&P delegates and members to proper considerations on the affiliation issue which was done directly before them and which required their vote before it could be submitted to the membership for a secret mail ballot referendum.

1838a

Thomas W. Gleason

THOMAS W. GLEASON

Sworn to before me this
17th day of January, 1975.

Joseph P. Hennessy

NOTARY PUBLIC

JOSEPH P. HENNESSY
NOTARY PUBLIC, State of New York
No. 43-1759550
Qualified in Richmond County
Certificates filed with:
New York Co. Clerk
Term Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JAMES D. HODGSON, Secretary of Labor
United States Department of Labor,

Plaintiff,

-against-

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendants.

72 Civ. 5031

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

----------x

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

BURTON M. EPSTEIN, being duly sworn, deposes and says:

I am an attorney associated with Marvin Schwartz, counsel for the defendant herein. I submit this affidavit in opposition to plaintiff's motion for summary judgment seeking an order declaring the 1971 election of officers conducted by the defendant void, and ordering a new election under the supervision of the Secretary of Labor.

This affidavit is limited to two points raised by plaintiff's motion, i.e., that a document entitled "60th Convention Newsletter on the Resolution of Affiliation of the IOMM&P with the ILA" constituted campaign literature, and that the incidents surrounding the availability of the membership list of former Local 88 constituted a violation of the Union's Offshore Division By-Laws and the By-Laws of Local 88.

Both of these items were the subject of a decision of the Honorable Thomas F. Croake, U.S. District Judge for the

Southern District of New York, as mentioned in plaintiff's Memorandum of Law, see Sheldon v. O'Callaghan, 335 F. Supp. 325 (S.D.N.Y. 1971), and subsequent Endorsement Order in the same case. (Plaintiff's Exhibits "CC" and "II", Rule 9(g) Statement)

Your deponent,on behalf of the defendant, appeared before Judge Croake on the argument of the motion leading to the above mentioned decision and the subsequent endorsement order, and consequently is familiar with such proceedings and the issues there involved.

NO EVIDENTIARY HEARING HELD

As a crucial preliminary matter, we call the Court's attention to the fact that the proceeding before Judge Croake was brought on by Order to Show Cause, and was a motion, pursuant to Rule 65, FRCP, seeking certain preliminary injunctive relief pending trial and ultimate disposition of the action. At no time did Judge Croake conduct an evidentiary hearing on any of the controverted issues before him; rather, on the basis only of the conflicting affidavits submitted on the motion, he issued a memorandum decision and order concerning the Newsletter and membership list.

It is submitted that such a procedure, absent an evidentiary hearing, which led to Judge Croake's memorandum decision, can in no way result in any "finding" either legally determinative of the issues relating to the Newsletter and membership list, or barring the defendant in this proceeding from its right to litigate such issues now pending before this Court relating to such Newsletter and membership list.

During the period July 26 through 30, 1971, the International Organization of Masters, Mates and Pilots held its 60th Annual Convention in Galveston, Texas. A highlight of that Convention was the adoption of a resolution entitled "Affiliation of the International Organization of the Masters, Mates and Pilots with the International Longshoremen's Association."

Such resolution came about after many months of preliminary discussions between the two unions, participation by port officers and officials of both unions, preliminary approval by the AFL-CIO Executive Council, and many other groundwork steps. The resolution, adopted by the Convention was to be submitted to a referendum vote of the International.

On or about August 19, 1971, in conjunction with such 90 day mail referendum, a document entitled "60th Convention Newsletter on the Resolution of Affiliation of the IOMM&P with the ILA" was mailed by the Union to its membership.

In tandem with this newsletter, on or about August 20, 1971, the very next day, the ballots on the affiliation question were mailed to the membership by the American Arbitration Association, which had been retained by the Union to conduct the 90 day mail referendum.

On September 16, 1971, almost a month later, three individual plaintiffs, members of the International Organization of Masters, Mates and Pilots, and candidates for office in the Union's upcoming election, commenced a suit in the United States District Court for the Southern District of New York, alleging, among other things, that the Newsletter, which had been distributed contemporaneously with the balloting on the ILA merger

and almost a month earlier, was in reality only a piece of campaign literature on behalf of the incumbent President, Thomas F. O'Callaghan *. At the time the lawsuit was commenced, the ballots for the Union election had not yet been sent to the membership. They were not scheduled for mailing until September 21, 1971, a date more than a month after the Newsletter and the affiliation ballots had been mailed.

On September 17, 1971, the plaintiffs obtained an Order to Show Cause signed by the Honorable Edward C. McLean returnable on September 21, 1971, before the Honorable Thomas F. Croake, seeking the same mandatory relief that was being sought in their complaint, i.e., that the defendant Union print and distribute by mail to all members of the Union, campaign literature on behalf of the suing candidates, whose text was to be prepared by those candidates, equivalent in size and form to the Newsletter which the plaintiffs alleged was campaign literature for the incumbent O'Callaghan. They also sought a stay of the mailing of the election ballots until the campaign literature sought by the plaintiffs was printed and distributed.

In their initial application for the Order to Show Cause before Judge McLean, plaintiffs also sought a temporary restraining order to stay the mailing of the ballots at least until the motion on preliminary injunction, returnable on September 21, 1971, would be heard and determined. Counsel for the Union, a representative of the American Arbitration Associa-

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*The complaint also alleged that another document, the August 1971 issue of the defendant's periodical the "Master, Mate and Pilot" also constituted campaign literature.

tion and counsel for the plaintiffs appeared before Judge McLean on the morning of September 17, 1971. After considerable discussion, Judge McLean refused to grant the temporary restraining order.

Such temporary restraining order which plaintiffs had requested but which was denied reads as follows:

> ORDERED, that pending hearing and determination of this motion and upon the posting of security in the amount of $ to cover costs and damages, defendants, their officers, agents, employees and attorneys and all other persons in active concert or participation with any of them, are restrained from mailing or causing or allowing to be mailed to members of defendant International Organization any ballots in connection with the election of International officers thereof until such time as the said campaign literature shall have been printed and mailed by defendants as aforesaid; and it is further

On September 21, 1971, counsel for the parties appeared on the Motion for a Preliminary Injunction before Judge Croake. Submitted in Opposition to the Motion for Preliminary Injunction was an affidavit by Thomas F. O'Callaghan, President of the defendant Union which denied that the materials

referred to and complained of by the plaintiff, Sheldon, were in any manner, shape or form "campaign literature." Such affidavit on the Preliminary Injunction motion sketched the background on the newsletter and the Convention, and concluded as follows:

> "It is submitted from the foregoing that the publications complained of by the plaintiffs do not constitute campaign literature. At any rate, this is an issue of fact to be determined by the trier after a full hearing, and that plaintiffs, on this motion have not demonstrated a probability that they will be successful in their claim following a hearing on merits. It is therefore respectfully urged that the application for preliminary relief sought by the plaintiffs herein be, in all respects, denied." [Emphasis supplied]

After argument by counsel, during which Judge Croake was advised that the ballots were scheduled to be mailed out that same day, Judge Croake refused to issue an order staying the mailing of such ballots despite the request for such relief made by counsel for the plaintiffs, and reserved decision on the motion. The ballots for the election were in fact mailed by the American Arbitration Association on September 21, 1971.

On October 5, 1971, while the motion was sub judice, the defendant served a timely answer to the plaintiff's com-

plaint, similarly denying plaintiff's allegations that the Newsletter and the other document complained of were campaign literature, and denying other aspects of the complaint dealing with the Local 88 membership list. (The membership list question was not a subject of the relief sought on the motion for a preliminary injunction, nor was it argued before Judge Croake, as will be discussed below.)

On October 18, 1971, twenty-seven days after refusing to issue an order staying the mailing of the ballots, and without conducting any evidentiary hearing on the facts in issue, Judge Croake rendered a decision purportedly finding that the Newsletter did constitute campaign literature, and that the plaintiffs were entitled to an opportunity to have campaign literature distributed in a similar manner.*

The procedure followed by Judge Croake and his resultant decision and purported findings are defective, and such alleged findings therefore are not legally determinative of the issue as to whether or not the Newsletter constituted campaign literature for the incumbent President, Captain O'Callaghan, nor do such defective "findings" bar the defendant from its right to litigate, on the merits, such issue in this lawsuit.

In order for any such proceeding before Judge Croake to have resulted in a decision or a finding that might, in some fashion, have constituted a legally determinative finding on the

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*In his decision, Judge Croake declared that the other document complained of, the August 1971 issue of the Master, Mate and Pilot was not campaign literature.

issues before Judge Croake, he would have been obliged, pur- 1846a
suant to Rule 65(a)(2) to order a trial "on the merits" and to permit both parties to submit evidence on the issues in controversy. This Judge Croake did not do.

Rule 65(a)(2) reads as follows:

> Rule 65. Injunctions.
> (a) Preliminary Injunction.
>
> ***
>
> (2) Consolidation of Hearing with Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction the Court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

The mandate of Rule 65 and the events which took place before Judge Croake clearly show that his decision and

ruling on the Newsletter are defective and cannot be used in the fashion suggested by the Secretary of Labor. Judge Croake denied the plaintiff's application for a preliminary injunction, finding that the conditions of urgency and the other criteria which give rise to the issuance of a preliminary injunction did not exist. He therefore was obliged to afford the defendant an opportunity to which defendant was entitled, to present evidence at a hearing on the issues in dispute, which he failed to do. His purported decision, therfore, cannot legally be sustained, nor can it stand as a bar to defendant's right to litigate the disputed issues in the instant case.

THE LOCAL 88 MEMBERSHIP LIST

The defectiveness of Judge Croake's decision vis a vis the Newsletter issue, a fortiori, renders similarly defective his decision regarding the membership list of former Local 88.

As stated above, Judge Croake's decision is defective by reason of his failure to afford an evidentiary hearing on the issues of fact raised before him on the motion for a preliminary injunction. It is doubly defective on the membership list issue, since this issue was not even mentioned in t e Order to Show Cause and motion seeking the preliminary injunction nor in any of the affidavits submitted on the motion. Nor was it even discussed by the attorneys or Judge Croake on the oral argument before him.

The Order to Show Cause was supported by two affidavits of Lloyd Sheldon, one of the plaintiffs in this action but not the plaintiff seeking the mailing list, and one affidavit

of Burton H. Hall, counsel for the plaintiff.

In none of these affidavits, nor in any of the exhibits annexed thereto, was there any reference to the mailing list. Moreover, in the Order to Show Cause seeking preliminary injunctive relief, no request whatsoever was made with regard to the membership mailing list. The application for preliminary relief dealt solely with the request by one of the plaintiffs, Lloyd Sheldon for campaign literature to be printed and distributed for him at the expense of the defendant International.

The issue relating to the membership list of Local 88 appeared solely in the plaintiffs' complaint which was filed on September 16, 1971. On October 5, 1971, while the motion on the Preliminary Injunction was still sub judice, the Union served a timely answer denying, among other things, that the plaintiffs were entitled to physical possession of a copy of the Local 88 membership list.

The opinion of Judge Croake dated October 18, 1971, was thus in error when he stated that allegations regarding the membership lists are "not disputed by defendants...". Those facts were disputed in the Answer of the defendant filed by the Court on October 6, 1971, prior to Judge Croake's opinion of October 18, 1971.

Finally, as more fully described in the accompanying Affidavit of Marvin Schwartz, Judge Croake's decision and order on the membership list does not even demonstrate that any alleged violation took place. On the motion for reargument, Judge Croake clearly indicated that at no time did he order that a physical copy of the Local 88 membership list was to be given to any of the plaintiffs. All his order provided, as

Judge Croake explained, was that the list be made available to the candidate for office. In fact, such list always was available to the candidate at the offices of the AAA in New York.

CONCLUSION

From the foregoing, it is respectfully submitted that Judge Croake's decision in the case of Sheldon v. O'Callaghan, 335 F. Supp. 325 (SDNY 1971) and his subsequent Endorsement Order in the same case dated November 15, 1971 did not constitute any "finding" legally determinative of the issues relating to the Newsletter and the membership lists, nor do they bar the union in this proceeding from its right to litigate such issues pending before this Court.

Burton M. Epstein

BURTON M. EPSTEIN

Sworn to before me this
22nd day of January, 1975.

Eileen M. Lefebure

Notary Public

EILEEN M. LEFEBURE
Notary Public, State of New York
No. 31-4600484
Qualified in New York County
Term Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,

Plaintiff,

-against-

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendant

72 Civ. 5031

AFFIDAVIT

----------x

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

KENNETH CAMISA, being duly sworn, deposes and says:

I am a Vice President of the Martin E. Segal Company and, during the period May 1968 through July 1972 I was Research Director for the International Organization of Masters, Mates and Pilots, the defendant in this case. I submit this affidavit in opposition to the plaintiff's motion for summary judgment.

As Research Director for the defendant, I was intimately involved in the proceedings relating to the Union's 1971 election. I know from my own personal knowledge that there was no purposeful delay in the mailing out of the ballots, nor, in fact, any "delay" as such. The International Ballot Committee and the other persons involved in the preparation of the 1971 election ballots worked expeditiously and diligently on the problems involved in preparing the ballot, and, in my opinion, in view of the difficulties entailed, it was remarkable that the ballots were prepared and mailed out as quickly as they were.

Following the Union's 60th Annual Convention which was held in July 1971, two referendum ballots had to be pre- 1851
pared for submission to the membership. One of these ballots was in connection with the affiliation of the MM&P with the ILA, and the other was the election ballot for the International Officers as well as for all Offshore Division officers and all Pilots Division officers.

The problems pertaining to the preparation of the ballots for the election of officers, were much greater than those involving the affiliation referendum. The Offshore Division had become fully formed prior to the balloting involved. However, the membership records of the former Offshore locals, which were transferred on a piece-meal basis to the Offshore Division office, were still being up-dated and corrected in connection with their being placed on computer.

Specifically, in view of the formation of the new omnibus Offshore Division, and the ability of a member to pay Offshore dues at any port, the problem of pigeonholing a particular Offshore Division member into the former Local to which he belonged, was a constant and continuing one. Reporting such payments to the Offshore Division office, with the requisite information necessary for a proper computer print, was not uniform and required considerable checking and follow-up.

However, this problem - of identifying an Offshore Division member by the former Local to which he belonged - was not one that involved the balloting on the affiliation vote, but was one crucial to the balloting on the election of officers.

That is, in order to prepare and send out the ballots for the affiliation referendum, it was only necessary to know that a certain individual was a member of the Offshore Division,

since the voting on the affiliation ballot was to be recorded only on a division basis, where the division was already fully formed.

This was in distinction to the balloting for the elective offices of the Offshore Division, where the balloting had to be on a port by port basis, since, in this transitional election, only the members of the former locals could vote for the officials in those ports.

Consequently, in order to prepare an accurate mailing list for the election of officers, it was necessary to double check with the former local on its membership list, in those cases where records at the Offshore headquarters only indicated that a man belonged to the Offshore Division, and did not show his past local affiliation. This was a very detailed and time-consuming process, which did not have to take place in connection with the affiliation ballot, since there was no need to know, for that balloting, what the individual's former local had been.

In addition, the affiliation referendum, involved the preparation of only one form of ballot. As distinguished from this, it was necessary to prepare nine separate ballots for the Offshore Division alone in the election balloting, since each former local was voting separately for its own offices. There were some 50 different offices involved in the Offshore Division, plus convention delegates from each of the ports. All told, there were more than 175 candidates for all of the offices that were to be voted for in the 1971 election. Exhibits D1 to D9 of plaintiff's Rule 9(g) Statement, are copies of the different Offshore Division ballots.

The problem of designing the election ballots and designating the positions of each of the candidates on these nine separate ballots in order to insure fairness to all, was also time-consuming. Apparently it was successful, since I have been informed that no challenge as to this aspect of the balloting procedures has been made.

In addition to the election ballots themselves, the Offshore Division prepared a special supplement to the Newspaper which had to be sent to the Offshore Division members at the same time as the ballots. This supplement was to contain pictures and statements from all candidates for Offshore Division office and candidates for convention delegates. This special election supplement was a 20 page broad sheet, whose preparation was extremely time-consuming.

The preparation of this special election supplement was required pursuant to the Offshore Division By-Laws Article V, Section 4, which states as follows:

> Section 4.
> There shall be a minimum of ninety (90) day voting period for the election of officers simultaneous with the election of International officers. At the outset of and during the said election period, each candidate shall be allowed equal space in the Organization's official publication to present his qualifications, views and photograph subject to reasonable rules uniformly imposed by the General Executive Board.

The newly-elected official shall take office on January 1.

THE INTERNATIONAL CONSTITUTION

The new Constitution of the International which became effective in October 1970, was the first document to be drafted providing for the massive restructuring of the Union. I was personally involved with the drafting of such document.

The provision for the mailing out of the ballots not later than the thirtieth day following the close of the nomination period, (Article V, Section 8(d)) related solely to the ballots for only three officers - the International President, the International Executive Vice President and the International Secretary-Treasurer. At the time that the Constitution was drafted and approved by the Convention delegates, none of the Offshore Division By-Laws had as yet been prepared.

Subsequent to the drafting of the International Constitution and its approval by the Convention delegates for later submission to the membership for ratification, the Offshore Division By-Laws were drafted. I also participated in this drafting.

The Offshore Division By-Laws provided, in Article V, that the election of the Offshore Division officers was to be conducted along with the election for the International officers, and to be supervised by the same International Ballot Committee which was to supervise the balloting for the International officers. Similarly, the Offshore Division election was to be conducted by the same impartial balloting agency that the Convention selected for the International election.

The AAA was selected by the Convention to conduct the election of officers, as well as the ILA affiliation referendum. In discussing the balloting with the AAA, they had indicated to me and to the International Ballot Committee their reluctance about the sending out of the two ballots too close together since they were concerned that it might be confusing to the membership who might mistakenly return ballots in the wrong envelope. This could have resulted in the voiding of their votes in both elections, which could have disenfranchised members from their right to have their ballot counted. In view of this, the AAA was completely in accord with the time schedule that eventually was followed, and at no time did they urge that the election ballots be sent out any earlier than they were.

The Union's staff to assist the ballot committee and work on the checking of membership, the dues status, and other matters relating to the election of officers, was very limited. The work primarily fell to me and to the Union controller. The ballot committee in addition to the mechanics of the balloting had to review and rule on challenges that had been raised by candidates.

In addition to the work relating to the affiliation referendum and the election of officers, with the detail and problems described above, other necessary activities of the Union were also going on at this time. These other activities required attention and work by me and the other people at the union office. In particular, it was about August 14, 1971, right in the midst of everything, that President Nixon established his wage and price freeze. Some attention had to be given to this, since the Union's contract was due to expire

in June the next year, and the membership would naturally, be making inquiries as to what the freeze meant for the future. 1856a Thought had to be given with respect to new contract demands that would be presented by the negotiating committee in advance of the contract's expiration.

I am prepared to testify in full with respect to not only the other matters which were going on in the Union at the time which consumed my attention, but also with more detail as to the matters I have described above relating to the preparation of the membership lists and the ballots for the affiliation referendum and the election of officers.

In sum, it is my opinion and belief that no violation was committed with respect to the date on which the ballots for the 1971 election were sent out.

Kenneth Camisa
KENNETH CAMISA

Sworn to before me this
22nd day of January, 1975.

Eileen M. Lefebure
Notary Public

EILEEN M. LEFEBURE
Notary Public, State of New York
No. 31-4600484
Qualified in New York County
Term Expires March 30, 1976

Memorandum on Behalf of Union

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,

Plaintiff,

-against-

72 Civ. 5031

INTERNATIONAL ORGANIZATION OF MASTERS,
MATES AND PILOTS, INTERNATIONAL
MARITIME DIVISION, ILA, AFL-CIO,

Defendant.

----------x

MEMORANDUM ON BEHALF OF UNION

The Union has submitted lengthy and detailed affidavits to this Court on the issues before it. Such affidavits have not only rebutted the allegations submitted by the Secretary in support of his motion for summary judgment but also have set forth facts sufficient to grant the Union's motion for summary judgment dismissing the complaint on the ground of mootness, or, alternatively, to grant the Union partial summary judgment dismissing certain of the allegations alleged in the Secretary's complaint.

No purpose would be served by repeating in this Memorandum the contents of the accompanying affidavits. Rather, we shall attempt here only to reemphasize those

significant points on which the Secretary has gone astray, and those points which compel a dismissal of the Secretary's complaint.

POINT I. THE SECRETARY'S BASIC ERRONEOUS PREMISE

An overview of the allegations described in the Secretary's moving papers reveals a basic error in his perception of Union activities, on which error he then proceeds to construct his allegations of wrongdoing.

That error is the Secretary's concept of a "test tube" union, embarking on an election, with all other activities of the Union geared to and inseparably intertwined with the election.

This concept completely misses the boat and shows a myopic understanding of the affairs of a union.

Unions are daily engaged in myriad activities on scores of matters. There are elections, but this is done on a one shot, periodic basis. There are dealings among fellow friendly unions, and there are vicious inter-union rivalries. There are contracts to be negotiated, and contracts to be enforced. There are grievances by individual members arising under a contract, and there are these grievances to be resolved through discussion or arbitration.

There are employers to contend with, who view the language of a collective bargaining agreement in a way different from the Union. These differences must be amicably resolved or brought to arbitration. There are matters dealing with the National Labor Relations Board.

There is a Union's extensive pension, welfare and vacation benefit plans under which disputes between union and employers arise, and grievances of beneficiaries arise. And finally, there is the constant flux within the Union structure itself, whereby structural changes are made by way of Constitution and By-Law amendments in order to keep the Union viable and responsive to the changes around it, and to avoid the fate of the dinosaur.

The Secretary fails to see the separate, individual existence of each of the aspects of the Union's activities, which, of necessity, sometimes occur concurrently.

The Secretary, instead, sees a Union's election as a hub of a wheel, and contends that all of these other independent activities are really only spokes, all connected with and tied into the election.

This is worse than myopia. It is megalomania. It leads to an unwarranted and unauthorized assumption by the Secretary of power over the affairs of a union in areas which Congress never intended.

THE AFFILIATION WITH THE ILA AND THE UNION'S ELECTION

This simplistic and erroneous approach by the Secretary is the basis for his allegation regarding the 60th Convention Newsletter and the Eleven Pledges Newsletter. These documents, as shown in the defendant's accompanying papers, were reflective of typically normal union activities involving a matter of crucial importance to the membership of the MM&P, the affiliation with the ILA.

It is conceded that the 60th Convention Newsletter is frankly pro-affiliation. But no law that we know of bars the Union leadership from strongly speaking out on matters which it feels to be of vital importance to the membership of the Union, and in fact, were such leadership to do less, they could be accused of violating their fiduciary responsibilities and positions of trust to the Union members.

The 33 to 1 mandate of the 60th Annual Convention favoring affiliation was clear. The clear and present dangers being faced by the Union from its rivals were such that the added strength that affiliation would afford was of vital necessity. A strong Newsletter favoring affiliation was imperative, especially to help overcome the racist prejudices against affiliation. The remarks aimed

at the anti-affiliation forces were entirely proper.

In his zealousness to pursue his claim regarding the alleged campaign literature, the Secretary fumbles into a hypothesis which is factually disproved.

In an effort to have not only the election for President set aside but also the election for all offices similarly voided, the Secretary contends that this alleged campaign literature was not only for Captain O'Callaghan but was for every other person on his slate as well as every incumbent official.

The fallacy of this is shown by the sample election results of the 1971 election, set forth in the accompanying affidavit of Marvin Schwartz, wherein it reveals a vast disparity in the percentage of votes obtained by the candidates running on the O'Callaghan slate. This, alone, is sufficient to defeat the claim of the Secretary since, clearly, whether or not the documents were campaign literature, they did not affect the outcome of the election.

JUDGE CROAKE'S DECISION

The matter before Judge Croake, as described in the accompanying document, was solely on a preliminary injunction. No evidentiary hearing was afforded, and so consequently it has no binding effect with respect to the

issues before this Court.

The case of Zdanok v. Glidden Co., cited by the Secretary adds no support to his argument with respect to the conclusiveness of Judge Croake's decision. Rather, it points up the defect in Judge Croake's decision.

The entire thrust of the discussion in the Zdanok case goes to the question of whether, in the prior proceedings, the matter in issue was "fully litigated."

As detailed in the accompanying papers, there was absolutely no semblance of full litigation on the issue. Conflicting affidavits were all that were presented to the Judge, and no evidentiary hearing was held. A preliminary injunction was denied from the bench and consequently there was no need for urgent disposition which, in some limited areas, (such as the granting of a temporary restraining order) might warrant deferring a full evidentiary hearing at the early stages of the proceedings.

The facts as presented on this motion do not support the conclusion that the document complained of constituted campaign literature. Moreover, these documents did not affect the outcome of the election. The Secretary's basic concept that all events concurrent with the elections are inextricably linked thereto is erroneous, and summary judgment based on these allegations must be denied.

OFFSHORE DIVISION VICE PRESIDENTS -
ATLANTIC AND GULF

As set forth fully in the accompanying papers, this matter is moot for a number of reasons. The complaint concerned a method of giving the added designation of Offshore Division Vice President which was limited solely to the 1971 transitional election. The 1974 intervening elections for the Offshore Division gave any member of the Offshore Division the right to be a candidate for any Offshore Division position, and all Offshore Division members voted for all Offshore Division positions.

Additionally, one argument often raised against mootness - i.e., that the person wrongfully elected to the position developed a power base which had to be dispelled by an election conducted under the supervision of the Secretary - is absent in this case.

Joseph B. Gaier and Robert L. Jones, the respective Offshore Vice President - Atlantic, and Offshore Vice President - Gulf, were duly elected to their positions as Port Agent for the ports of New York and Galveston, and so therefore did not have any improper power base to start with. They were merely given the added position by reason of their valid election to the Port Agent position.

Most important, however, is the fact that in the

intervening 1974 election, both Gaier and Jones have been defeated for re-election, both beaten by anti-O'Callaghan slate candidates. Consequently, it is obvious that no viable power base existed which needs to be neutralized. Consequently, the defense of mootness is a valid one in this instance, and no re-election for these positions should be ordered. The Secretary's motion for summary judgment based on this allegation must be denied.*

THE TIMING OF THE MAILING OUT OF THE BALLOTS

The Secretary's erroneous understanding of the nature and scope of union activities also lies at the bottom of this allegation.

The Secretary's Machiavellian view of union activities is best seen in his fanciful comments appearing at page 70 of his Memorandum, as follows:

> "One can imagine the O'Callaghan forces anxiously awaiting the

*Aside from the mootness issue, the Union contends, as set forth in the accompanying affidavit, that for many reasons, there was no illegality about the method of designating the Vice Presidents for the transitional term. We will not repeat that discussion in this memorandum, but respectfully refer the Court to the accompanying affidavit on this point.

results of the IOMM&P - ILA merger referendum, and, assuming the results were positive, spreading that message November 26, with the Eleven Pledges to take one more swipe at Sheldon."

This conspiratorial view of the Union is just not correct. The affidavit of Kenneth Camisa describes the events which were going on at the time of the election and the difficulties that had to be overcome to prepare the nine different Offshore Division ballots for the 1971 election, and to properly up-date and finalize the membership lists to be sure that proper Offshore Division ballots were sent to the proper electorate. The time of the mailing of the ballots was related solely to these problems and events.

The Secretary's contention is also, as discussed in the accompanying affidavt, a classic "damned if you do and damned if you don't" argument. Had the ballots gone out by August 27, 1971, the date stated in the Secretary's Memorandum at page 88, there would be the contention that the mailing of the ballots so closely following the mailing of tne 60th Convention Newsletter, tainted the election.

This would also create and reinforce a bootstrap argument that the proximity of two mailings compels the conclusion that the 60th Convention Newsletter was a piece of campaign literature.

These arguments of the Secretary are without merit, and this allegation cannot support a motion for summary judgment.

THE LOCAL 88 MEMBERSHIP LIST

This final argument in support of the Secretary's motion for summary judgment is similarly discussed and rebutted at length in the accompanying affidavits of Marvin Schwartz and Burton M. Epstein.

The facts show that the Local 88 Constitution does not grant the right of a Local 88 member to physical possession of a copy of the mailing list. A Local 88 candidate only had the right to have such mailing list available to him, and it is undisputed that in the 1971 election, this right was afforded. The mailing list was always available at the office of the American Arbitration Association in New York, which was the city in which Local 88's office is located.

Even Judge Croake's decision and order, defective and non-binding as it was, did not grant a Local 88 candidate the right to physical possession of a mailing list.

This was made clear by Judge Croake's memorandum order issued upon motion for re-argument.

This allegation of the Secretary likewise is without merit, and consequently, the Secretary's motion for summary judgment on all counts, should be denied.

THE UNION'S INDEPENDENT MOTION
FOR SUMMARY JUDGMENT

The Secretary quotes extensively from the Glass Bottle Blowers case. However, an examination of that case, and the rationale set forth to justify a new election under the supervision of the Secretary despite the intervening unsupervised election is inapplicable in the instant case.

The touchstone of the Glass Bottle Blowers case is found in the quote appearing therefrom at page 104 of the Secretary's Memorandum. This reads as follows:

> "We cannot agree that this statutory scheme is satisfied by the happenstance intervention of an unsupervised election. The notion that the unlawfulness affecting the challenged election should be considered as washed away by the following election disregards Congress' evident conclusion that only a supervised election could offer assurance that the officers who achieved office as beneficiaries of violations of the Act would not by some means

perpetuate their unlawful control in the succeeding election."[Emphasis supplied]

The facts resulting from the intervening 1974 election show that there has been no perpetuation of control in the succeeding election. The 1971 O'Callaghan slate and the incumbents have almost all been defeated in the intervening election, and many of the 1971 O'Callaghan slate did not even run for re-election in the 1974 balloting.

Captain O'Callaghan himself is in a run-off election, having managed only to place second in the balloting. Similarly, Captain Caldwell, the O'Callaghan slate candidate elected International Executive Vice President in 1971 and seeking re-election in 1974, is also in a run-off.

These failures in the 1974 election demonstrate the absence of the evil that the Secretary's supervised election was designed to counteract.

The mischief that would be caused by the ordering of another election under the supervision of the Secretary has been described in the accompanying affidavit of Marvin Schwartz. Aside from giving the now-defeated candidates on the O'Callaghan slate another chance to run

for office, it would impose a burdensome drain on the treasury of the Union.

We appreciate that this additional cost, in and of itself, may not be sufficient reason for not ordering a new election under the Secretary's supervision, but such considerations coupled with the results of the 1974 election and the absence of the evil which the Glass Bottle Blowers case speaks about, fully justifies and, indeed, compels a refusal to order a new election. Such election would serve no legislative or public interest goals, and could only result in injury to the membership.

It is therefore respectfully urged that the Union's motion for summary judgment be granted, and that the Secretary's complaint be dismissed.

ALTERNATIVE MOTION FOR
PARTIAL SUMMARY JUDGMENT

The Union has moved, in the alternative, for partial summary judgment dismissing certain allegations set forth in the Secretary's complaint.

These have been fully described and argument thereon has been set forth in the accompanying affidavit of Marvin Schwartz, which need not be repeated here. If the Union's motion for summary judgment dismissing the Secretary's entire lawsuit is not granted, summary judg-

ment dismissing those allegations in the Secretary's complaint discussed and described in the accompanying affidavit of Marvin Schwartz, should be granted.

CONCLUSION

From the foregoing, and from the documents accompanying this Memorandum, it is respectfully urged that the Secretary's motion for summary judgment be denied, and that the Union's motion for summary judgment dismissing the Secretary's complaint or, in the alternative, dismissing certain allegations contained therein, be granted.

Dated: New York, N.Y.
January 23, 1975

Respectfully submitted,

MARVIN SCHWARTZ

By Burton M. Epstein

Attorney for Defendant
International Organization
of Masters, Mates and
Pilots
243 Waverly Place
New York, New York 10014
Tel. No. 212-691-2250

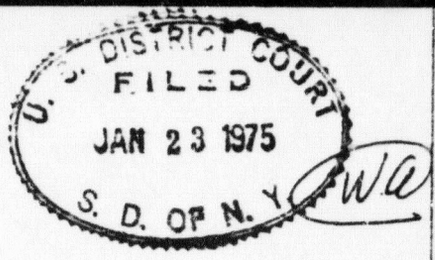
BURTON M. EPSTEIN,

Of Counsel

Defendant's Statement under Rule 9 (g)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

1872a



---x

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Plaintiff,

-against-

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendant.

---x

72 Civ. 5031 CBM

DEFENDANT'S STATEMENT IN RESPONSE TO PLAINTIFF'S STATEMENT UNDER RULE 9(g)

Defendant responds to the plaintiff's Statement under Rule 9(g) by controverting certain of the plaintiff's allegations as follows:

4. Denies as stated. See No. 6 below.

6. Denies as stated. Defendant has raised an affirmative defense to this action which is set forth in the defendant's accompanying papers, and which was asserted in its answer and described to plaintiff in the Union's answers to interrogatories.

14. Denies as stated except admits that at the time of the 1971 election, there was no fully formed Inland Division.

17. Denies. To the contrary, defendant alleges that at the time of the 1971 election of officers, Local 47 was no longer affiliated with or a subdivision or an Inland Local of the IOMM&P, having been disaffiliated effective October 1, 1970, and that members of former Local 47 were not thereafter members of the IOMM&P and did not receive ballots and were not entitled to vote in the defendant's 1971 election.

18. Denies as stated, except admits that at the time of the election the Pilots Division was fully formed, and consisted of approximately 500 members employed, in the main, as ships' pilots aboard American and foreign flag oceangoing vessels.

19. Denies to the extent that there is a typographical error. The word "maritime" should be "marine".

23. Admits, except further avers that pursuant to subsequent constitutional amendments, the members of the International Ballot Committee who were nominated and elected to supervise the 1974 election of officers did not have to be delegates to the 1974 Convention.

24. Denies. The facts underlying this denial are set forth in the accompanying papers submitted by defendant.

29. Denies, but admits that the 1971 election of officers was conducted by mail ballot, and that such ballots were mailed by the American Arbitration Association on September 21, 1971.

41. Denies except admits that Exhibits D1 to D9 are copies of the official ballots for the Offshore Division offices as indicated thereon. Certain characterizations and statements appearing on plaintiff's Exhibit E, which is a document that has been prepared by the plaintiff, are erroneous and are denied, and consequently defendant admits solely to what has been set forth above.

52. Denies as stated. Former Inland Local 47 and the members thereof, were not part of the International Organization of Masters, Mates and Pilots at the time of the 1971 election, and were not entitled to vote in such election.

62. Denies as stated. The certification itself was not the final result, since candidates had an opportunity to appeal therefrom. 1874a

63. Denies as stated. Defendant admits that run-offs were held as indicated. The Local 90 By-Laws were no longer in effect after the run-off election nor for any future elections for Offshore Divison offices.

64. Denies. This information is not known to the defendant, it deals with information possibly known to a third party.

65. Denies. See explanation set forth in number 64 above.

66. Denies. See explanation set forth in number 64 above.

67. Denies. See explanation set forth in number 64 above.

76. Denies. This information as to when the complainants filed their complaint with the Secretary is not known to the defendant, but it admits that such complaint was filed no earlier than March 29, 1972. Defendant further admits that Burton H. Hall was the attorney for the complainants.

87. Denies as stated. A motion for a preliminary injunction by way of Order to Show Cause was brought on before the Honorable Thomas F. Croake. The facts underlying this denial and with respect to this matter are set forth in the accompanying papers submitted by the defendant.

88. Denies. This allegation, among other things, is conclusory in nature. The facts underlying defendant's denial and with respect to this matter are set forth in the accompanying papers submitted by the defendant.

89. Denies. This allegation, among other things, is conclusory in nature. The facts underlying defendant's denial and with respect to this matter are set forth in the accompanying papers submitted by the defendant. 1875a

90. Denies. The allegations under number 90, are among other things, conclusory in nature, and the facts underlying defendant's denial and with respect to this matter are set forth in the accompanying papers submitted by the defendant.

94. Denies. Defendant cannot vouch for the accuracy of Exhibit N, but admitsthat a substantial number of ballots, probably in the approximate amount set forth, had been received by November 9, 1971.

98. Denies. This information is not personally known to the defendant.

99. Denies. Defendant has no knowledge of the source of such document nor does it admit to the statements contained therein.

100. Denies. See number 99 above.

101. Denies. See number 99 above.

102. Denies. See number 99 above.

104. Denies as stated. The document speaks for itself.

105. Denies as stated. The document speaks for itself.

109. Denies. Defendant has no knowledge of this allegation.

111. Denies. Each member of the General Executive Board has an equal vote pursuant to the new Constitutional amendment. See accompanying papers submitted by the defendant.

121. Denies. The facts underlying this denial are set forth in defendant's accompanying documents.

122. Denies. The facts underlying this denial are set forth in defendant's accompanying documents.

123. Denies.

124. Denies as stated. Defendant admits that the language of the Constitution speaks for itself, but alleges that no violation was committed in connection with the mailing out of the ballots. The facts underlying this denial are set forth in defendant's accompanying documents.

129. Denies, except admits that the document was distributed before the ballots were mailed out.

130. Denies as stated. The facts underlying this denial are set forth in defendant's accompanying papers.

133. Denies as stated. The language of the section speaks for itself, but defendant bases its denial as to the meaning, intent and purpose of such section on the facts set forth in the defendant's accompanying documents.

134. Denies. See number 133 above.

135. Denies. See number 133 above. Defendant alleges that the meaning, intent and purpose of such section, as declared by the American Arbitration Association Arbitrator Israel Ben Shriber, and as subsequently followed and adopted by the authoritative leadership of Local 88, is that no member of Local 88 was entitled to physical possession of the membership list.

136. Denies. See answers 133 through 135 above.

137. Denies as stated. The IOMM&P International Ballot Committee denied the request of Local 88 candidates for

physical possession of a copy of a mailing list. All candidates were at all times granted access to such membership lists and these membership lists were available to all Local 88 candidates.

138. Denies. The facts underlying this denial and with respect to this matter are set forth in the defendant's accompanying documents.

139. Denies. The facts underlying this denial and with respect to this matter are set forth in the defendant's accompanying documents.

140. Denies. See number 139 above.

141. Denies. See number 139 above.

143. Denies. This information is unknown to the defendant.

147. Denies. A copy of Local 88 membership list was always available to all candidates for Local 88 office. The facts underlying this denial and with respect to this matter are set forth in defendant's accompanying papers.

Dated: New York, New York
January 23, 1975

Respectfully submitted,

MARVIN SCHWARTZ

By _____

Attorney for Defendant
243 Waverly Place
New York, N.Y. 10014
Tel. 212-691-2250

TO:

PAUL J. CURRAN, Esq.
U.S. Attorney for the
Southern District of
New York
Attorney for Plaintiff
U.S. Courthouse
Foley Square
New York, New York

Defendant's Statement in Support of Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
JAN 23 1975
S. D. OF N. Y.

W.a

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,

Plaintiff,

-against-

72 Civ. 5031
CBM

INTERNATIONAL ORGANIZATION OF MASTERS,
MATES AND PILOTS, INTERNATIONAL
MARITIME DIVISION, ILA, AFL-CIO,

Defendant.

STATEMENT OF DEFENDANT IN SUPPORT OF ITS INDEPENDENT MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR PARTIAL SUMMARY JUDGMENT UNDER RULE 9(g) OF THE RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Pursuant to Rule 9(g), defendant, on its independent motion for summary judgment or in the alternative for partial summary judgment makes this statement of the material facts as to which it contends there is no genuine issue to be tried.

1. The membership of Local 47, by referendum, voted to disaffiliate from the International Organization of Masters, Mates and Pilots ("MM&P"or "Union").

2. Such disaffiliation became effective October 1, 1970.

3. The disaffiliation resolution approved by Local 47 membership referendum is set forth at pages 7 and 8 of the accompanying affidavit of Marvin Schwartz.

4. Since October 1, 1970, there has been no membership referendum among the members of Local 47 to reaffiliate

14. The amendment described in the preceding paragraph, and the implementation thereof, is as described on page 19 of the affidavit of Marvin Schwartz.

15. Prior to the 1971 election, an Offshore Division Local official had the power to adjust a grievance arising under the collective bargaining agreement for an Offshore Division member of a different local in the manner described on page 22 of the affidavit of Marvin Schwartz.

16. Prior to the 1971 transitional election, when the union had a semi-autonomous local structure, only members of a particular Offshore Division Local could be candidates to run for office in the particular local.

17. The new Constitution of the International which became effective in October 1970, was drafted and approved by Convention delegates prior to the drafting of the Offshore Division By-Laws which also became effective in October 1970.

18. No evidentiary hearing was conducted by Judge Croake prior to rendering his October 18, 1971 decision (plaintiff's exhibit CC to Rule 9(g) Statement) his Order of November 4, 1971 (Exhibit DD, ibid.) and his Endorsement (Exhibit II, ibid.)

18a. All Union membership lists were maintained at the American Arbitration Association offices in New York, and were available for inspection there by candidates for office in the 1971 election.

19. The same provision relating to Local 88 membership lists as set forth in Exhibit HH to the Secretary's Rule 9(g) Statement was in existence in 1967 and in 1969.

20. The complainants described in item number 76 to plaintiff's Rule 9(g) Statement knew that the General

with the MM&P.

5. At its 1971 Convention, the vote of the delegates in favor of the affiliation with the ILA was 33 for and 1 against.

6. Lloyd Sheldon, a delegate to the Union's 1971 Convention, cast the one vote against affiliation with the ILA.

7. Ballots on the affiliation referendum were mailed to the membership on August 20, 1971.

8. The balloting on the affiliation referendum was conducted by the American Arbitration Association.

9. Objections based on racial prejudice were raised against the ILA affiliation.

10. In all elections subsequent to the 1971 transitional election, all members in good standing of the Offshore Division, provided they meet the qualification requirements set forth in Article IV of the Offshore Division By-Laws are Article III, Section 4 of the International Constitution, can be candidates for all Offshore Division offices.

11. In all elections subsequent to the 1971 transitional election, all members in good standing of the Offshore Division, as defined in the Offshore Division By-Laws and the International Constitution, are entitled to vote for all Offshore Division offices.

12. In the 1974 election conducted by the MM&P, the conditions set forth in numbers 10 and 11 prevailed and were followed.

13. In January 1974, the Offshore Division By-Laws were amended to eliminate the separate positions of Offshore Division Vice Presidents.

Executive Board would entertain their appeals from the IBC rulings at their meeting to be held on January 25, and 26, 1972 in San Diego, California.

21. The complainants knew of the dates of such meeting prior to January 25, 1972.

22. At their meeting on January 26, 1972, the General Executive Board denied the appeals of the complainants from the International Ballot Committee rulings.

23. The union has conducted an election of officers (hereinafter "intervening election"). The ballots for such election went out on or about September 24, 1974 (see Secretary's Memorandum page 103).

24. This intervening election was conducted by the American Arbitration Association.

25. In such intervening election, there is a run-off for the office of President between Thomas F. O'Callaghan, the incumbent and Frank Scavo. Frank Scavo received a greater percentage of the vote than did Captain O'Callaghan.

26. In the intervening election, Captain William Caldwell is in a run-off for the position of International Executive Vice President.

27. The description of the results in the intervening election in the several ports set forth in pages 34 and 35 of the accompanying affidavit of Marvin Schwartz is correct.

28. The statements set forth with respect to Patrick J. King, John Beirne, Henry J. Stegall and John Handley, in the last paragraph on page 35 of the accompanying affidavit of Marvin Schwartz are correct.

29. The statements set forth with respect to Charles Hemming and Henry Nereaux appearing on page 36 of the accompanying affidavit of Marvin Schwartz are correct.

30. Lloyd Sheldon, a complainant in the 1971 election who opposed Captain O'Callaghan for the Presidency in such election, was not a candidate for office in the intervening election.

31. The vast majority of unions within the labor movement contain or are involved in some sort of pyramid structure, as described on pages 40 and 41 of the accompanying affidavit of Marvin Schwartz.

32. The Union's General Executive Board now consists of the following:

International President
International Executive Vice President
International Secretary-Treasurer
Offshore Division Vice President - Atlantic
Offshore Division Vice President - Gulf
Offshore Division Vice President - Pacific
Pilots Vice President
Executive Officer - Inland - Atlantic and Gulf Region
Executive Officer - Inland - Pacific Region
Executive Officer - Local 30
Executive Officer - Local 27

33. The amended Article VII, Section 1 of the International Constitution, presently in effect, is as set forth in the footnote appearing on page 44 of the accompanying affidavit of Marvin Schwartz, described as "the new section".

34. The exhibits annexed to the accompanying affidavit of Marvin Schwartz referred to on page 48 thereof, are true copies of the Stipulations described therein.

35. The failure to count the non-postmarked ballots in the 1971 election did not affect the outcome of any elective office.

36. The Union's membership lists were maintained at the New York Offices of the American Arbitration Association, where they were available for inspection by candidates running for office in the 1971 election.

37. Candidates for office in the 1971 election were able to distribute their campaign literature through the offices of the American Arbitration Association in New York.

Dated: New York, New York
January 23, 1975.

Respectfully submitted,

MARVIN SCHWARTZ

By _____

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TO:

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Attention: Dennison Young, Jr., Esq.

Amicus Curiae Brief

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor, Plaintiff, -against- INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO, Defendant.	72 Civ. 5031 CMB AMICUS CURAE BRIEF ON BEHALF OF FRANK T. SCAVO, GERALD L. JOHNSON and TIMOTHY BROWN

STATEMENT OF PROCEEDINGS

An action has been instituted by the Secretary of Labor (hereinafter "Plaintiff") against the International Organization of Masters, Mates and Pilots, International Maritime Division, ILA, AFL-CIO, (hereinafter "Union") pursuant to Section 402 of the Labor Management Reporting and Disclosure Act, 29 USC §482, seeking to establish that the outcome of the 1971 election of the Union may have been affected by violations of Section 481 of Title 29. Plaintiff seeks the relief of a declaration that the Union election of 1971 is void and the direction that a new election be conducted under the supervision of Plaintiff. Plaintiff has

moved for summary judgment and the Union has cross-moved for summary judgment. On February 6, 1975 an application was submitted to the Court for leave to intervene or appear as amicus curae on behalf of Captain Scavo, Captain Johnson and Captain Brown. On February 12, 1975 this Court granted leave to file an amicus brief by March 21, 1975. The within brief is submitted on behalf of Captain Scavo, Captain Johnson and Captain Brown pursuant to the aforesaid leave granted by this Court.

STATEMENT OF FACTS

For purposes of this brief, Captain Scavo, Captain Johnson and Captain Brown shall not deal with the issue of whether or not violations of Title 29 United States Code, Section 481, occurred in connection with the 1971 election other than to adopt generally the position taken by the Plaintiff, inasmuch as the Plaintiff apparently has conducted an exhaustive investigation in accordance with his responsibilities pursuant to Title 29 U.S. Code, Section 482(b) and inasmuch as the facts set forth in Plaintiff's submissions to this Court generally accord with the facts known or believed

by Captain Scavo, Captain Johnson and Captain Brown. Whether such facts can be established by a preponderance of the evidence after a trial upon the merits to establish a violation of Section 481 which may have affected the outcome of the election as required pursuant to Section 482(c) of Title 29, remains an open question as to which Captain Scavo, Captain Johnson and Captain Brown are in no position at this time to provide a definitive answer. It would appear, however, that a sufficient showing has been made by the Plaintiff so that the Union's motion for summary judgment would be completely premature but for the circumstances of an intervening election.

The Election of 1974

During the course of the present litigation, the Union conducted its normal triennial election. The successful incumbents in the challenged 1971 election had been in office from the certification of the 1971 election and were in office at the time that the 1974 election was conducted. The insurgent candidates, including Captain Scavo, who was a candidate for international president, Captain Johnson, who was a candidate for international vice-president, and

Captain Brown, who was a candidate for international secretary, were confronted with an overwhelming dilemma. On the one hand because of the pending lawsuit instituted by the Plaintiff, Captain Scavo, Captain Johnson and Captain Brown could have determined not to contest the election, but such a decision could have resulted in perpetuating the incumbents in office for another three year term since there was no assurance that the Plaintiff would be successful in the present litigation. On the other hand, Captain Scavo, Captain Johnson and Captain Brown could devote the substantial resources, time and effort required in order to contest the election and run the risk that were they to succeed in their insurgent campaigns, the possibility existed that the election might be voided and a brand new election conducted. Thus, the substantial investment required of any meaningful insurgent campaign might all have been for naught since the incumbents could have benefited from their own illegal acts in connection with the 1971 election by having the Plaintiff set aside the 1974 election, thus providing the incumbents with the opportunity to wear down any insurgent candidate by exhausting the resources of such candidates. Obviously, such a Hobson's Choice could

have the effect of inhibiting union democracy and entrenching incumbents in office by discouraging insurgent candidates. As will be shown, this would be precisely the opposite result sought by Congress in enacting the Labor Management Reporting and Disclosure Act. In fact, Captain Scavo, Captain Johnson and Captain Brown determined to contest the election of 1974 since this was the only responsible choice available to union members concerned with effectuating a change in union leadership. There has previously been submitted to this Court a copy of the certification of results by the American Arbitration Association of the 1974 election. The election resulted in the defeat of some of the most influential incumbents throughout the country and a basic change in the leadership of the Union. The election turn-out was one of the largest in the history of the Union and it would appear clear beyond cavil that there were no violations of Section 481 in connection with the 1974 election and that even were there to have been such violations, clearly they did not affect the outcome of the election in that the results themselves established that the Union members were able to exercise their democratic rights and to selectively replace sizable

numbers of incumbents.

With respect to Captain Scavo, Captain Johnson and Captain Brown, Captain Brown was defeated by Captain Lowen, the incumbent international secretary. Nonetheless, Captain Brown determined that the 1974 election was conducted in accordance with law and has filed no grievance with the Union nor has he filed any complaint with the Plaintiff nor does he intend to do so. Captain Scavo ran first in the election for international president and received in excess of 39% of all votes cast. Nonetheless, as 40% of the votes are required for election as international president, a run-off election is now in process between Captain Scavo and the incumbent international president, Captain O'Callaghan. Similarly, a run-off election is in process between Captain Johnson and Captain Caldwell. These are the only two offices of the Union remaining unfilled as a result of the 1974 election.

Election Procedures

Inasmuch as the Union consists primarily of ocean-going maritime offices, large numbers of whom are at sea for periods normally ranging upwards of six months, the Union has adopted rules providing for election by mail ballot with

a 90-day period for balloting. These procedures are extremely costly and campaigning in such circumstances is extremely difficult. Members of the Union reside all over the country and concentrations of member exist in every major port in the United States. Large numbers of members are located in the Panama Canal Zone and thus the expenses of travel and mailings in order to conduct a campaign are unusually large. Much of the campaign necessarily involves meeting ships at ports throughout the country as they arrive in order to be able to meet with the handful of ships' officers who are members of the Union. The vast majority of personnel on any ship are not licensed officers and therefore are not members of the Union. When the ballots are counted, very extensive and complicated procedures exist concerning the challenging of ballots. With respect to the 1974 election, it took approximately 30 days before ballots could be counted and the the results certified. Approximately one additional month was required in order to go forward with the run-off election procedures preparatory to the mailing of ballots. Thus where an election and a run-off election are held, the Union is engaged in election procedures for some ten months of the year as follows:

(a) Approximately one month to process the ballots and the mailing lists prior to the mailing of the ballots for the general election;

(b) Three months for the balloting period;

(c) Approximately one month for the certification process;

(d) Approximately one month for the processing of ballots and mailing lists for the run-off election;

(e) Three months for the conduct of balloting for the run-off election;

(f) Approximately one month for the certification of the run-off election.

During that time the ability of the Union to carry forward its responsibilities in dealing on behalf of its members with the employers who employ its members, with the Coast Guard which licenses its members, with the Congress which sets forth rules and regulations governing maritime operations, with other maritime unions representing the personnel aboard the same ships, and with others who affect the life and livelihood of union members is seriously restricted.

Thus, in effect, for ten months every three years the Union leadership is in a state of uncertainty and is immobilized to a large extent from taking long term action to protect the interests of Union members. Were the process to be expanded by yet another election within a three year period, the likely result would be to create a state of uncertainty, vulnerability, and chaos for members of the Union for a period of 20 out of 36 months. Moreover, the burdens and expenses imposed upon potential insurgent candidates would be so overwhelming as to discourage such candidacies and to tend to insure the perpetuation in office of the incumbents who may have achieved office in the first place as a result of violations of law within the meaning of §481 of Title 29. Thus, as will be shown, in the event that a fair and lawful election is held (both as to the general election and as to the run-off now in process), it would wreak havoc upon Union members and impose outrageous burdens upon insurgent candidates to subject them to a supervised rerun election before the end of the three year term for which they seek office. On the other hand, however, in the event that unlawful conduct should occur in connection with the run-off election, then

there is no alternative in order to protect free and democratic union elections than to compel a rerun election supervised by the Plaintiff, for despite the damage which such an election would cause, the alternative of permitting incumbents to remain in office under the cloud of a tainted victory would be far worse.

QUESTION PRESENTED

In the event that a free and democratic election occurs after an election which has been challenged and in the event that the result of the intervening election is untainted by the misconduct which occurred in the challenged election, is the court compelled to order a special rerun election?

POINT I

THE ORDER OF A SPECIAL RERUN ELECTION SUPERVISED BY PLAINTIFF IS UNWARRANTED AND IMPROPER WHERE A FREE AND DEMOCRATIC ELECTION HAS INTERVENED WHICH IS UNTAINTED BY UNLAWFUL ACTS DURING THE COURSE OF A PRIOR ELECTION.

Plaintiff has apparently asserted the position that an intervening election is irrelevant to the issue of whether or not a supervised election should be ordered. The Union

has apparently taken the position that an intervening election moots an action by the Plaintiff challenging a prior election even though the intervening election is still in process in that a run-off has not yet been completed nor certified.

Captain Scavo, Captain Johnson, and Captain Brown respectfully dispute both positions in that neither seems to give any consideration whatsoever to the fundamental purposes of Congress in enacting the Labor Management Reporting and Disclosure Act, or to the realities of the present situation affecting the Union. For Plaintiff's position to prevail, this court would be compelled to disregard the caution of the United States Supreme Court as set forth in the case upon which Plaintiffs themselves rely for their position. Thus, in Wirtz v. Bottle Blowers Association, 389 U.S. 463, 468 (1968), the Supreme Court stated:

> "We have cautioned against a literal reading of congressional labor legislation; such legislation is often the product of conflict and compromise between strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve. See, e.g., National Woodwork Mfgs. Assn. v. NLRB, 386 U.S. 612, 619. The LMRDA is no exception."

The Supreme Court quoted with approval remarks by Archibald Cox appearing in an article in the Michigan Law Review:

> "Archibald Cox, who actively participated in shaping much of the LMRDA, has remarked:
>
> 'The legislation contains more than its share of problems for judicial interpretation because much of the bill was written on the floor of the Senate or House of Representatives and because many sections contain calculated ambiguities or political compromises essential to secure a majority. Consequently, in resolving them the courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words.' Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 852 (1960)." (Supra at p. 469)

This court has consistently refused to apply the labor laws in general and the Labor Management Reporting and Disclosure Act in particular in a vacuum in such a way as to do irreparable damage to the purposes for which the law was enacted. Thus, this court quoted with approval a statement from the Western District of Pennsylvania in the District Court opinion in Wirtz v. Bottle Blowers Association, supra, 244 F.Supp. 745, 749:

> "Reasonableness is not to be assessed in vacue, but in the light of the purposes which the Congress sought to achieve

> and the evils which it sought to eliminate. Union democracy, effective self-government, abolition of oligarchical cliques and self-serving union officers were in the forefront of Congressional thinking. Section 401 itself seeks to open the path of eligibility to office to all union members in good standing. . ."
> (Wirtz v. National Maritime Union, 284 F.Supp. 47 (SDNY 1968), aff'd. in all respects, 399 F.2d 544 (2d Cir.1968))

The United States Supreme Court has set forth the purpose of Congress in enacting the Labor Management Reporting and Disclosure Act as follows:

> "Examination of the relevant legislative materials reveals a clear congressional concern for the need to remedy abuses in union elections without departing needlessly from the longstanding congressional policy against unnecessary governmental interference with internal union affairs, Wirtz v. Glass Bottle Blowers Assn., 389 U.S. 463, 470-471 (1968). The introduction to the Senate report accompanying the Act summarizes the general objectives of Congress:
>
> 'A strong, independent labor movement is a vital part of American institutions. The shocking abuses revealed by recent investigations have been confined to a few unions. The overwhelming majority are honestly and democratically run. In providing remedies for existing evils the Senate should be careful neither to undermine self-government within the labor movement nor to weaken unions in their role as the bargaining representatives of employees.'" S.Rep. No. 187, 86th Cong.,1st Sess. 5 (1959). (Hodgson v. Steelworkers, 403U.S. 333, 338-339(1971))

The Bottle Blowers Association case, supra, involved a situation in which incumbent union officers who had achieved and perpetuated themselves in office through violations of Title 29, USC §481 caused an election to proceed after an action had been commenced by the Secretary of Labor. The incumbent officers won the intervening election and claimed that the action by the Secretary of Labor was thereby automatically mooted in that there were no claims that the intervening election was conducted in such a manner as to violate §481. The Supreme Court denied the contention that the conduct of an intervening election automatically mooted an action of the Secretary of Labor. The Court quite reasonably determined that an intervening election could still be tainted by the illegal conduct of the incumbents in the prior election and thus a supervised election by the Secretary of Labor could still be appropriate. The Plaintiff in this case, however, misconstrues the Bottle Blowers Association case by misinterpreting the holding as being that an intervening election is irrelevant and that the intervening election automatically does not moot the action by Plaintiff under §482. A reading of the opinion of the Bottle Blowers Association case makes it apparent that the Supreme Court was

seeking to eliminate any mechanical or blanket approach to the difficult problems of balancing prevention of abuses in union elections as against avoiding unnecessary governmental intrusion into internal union affairs. Moreover, the Supreme Court was particularly concerned with evaluating each situation with regard to the specific abuses which lead Congress to enact the Labor Management Reporting and Disclosure Act. Thus, it is apparent that the Court adopted a rule which compels evaluation of a subsequent election to determine whether such subsequent election was tainted by unfair advantages to the incumbents flowing from the violation of law by incumbents in a prior election. In the event that tainting occurred, there would be no mooting of the action by the Secretary of Labor. On the other hand, if the subsequent election was untainted then the violations in the prior election would no longer be relevant and the case by the Secretary of Labor would be moot. Thus, the Court stated:

> "Title IV's special function in furthering the overall goals of the LMRDA is to insure 'free and democratic' elections. The legislative history shows that Congress weighed how best to legislate against revealed abuses in union elections without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal affairs.

> The extensive and vigorous debate over Title IV manifested a conflict over the extent to which governmental intervention in this most crucial aspect of internal union affairs was necessary or desirable. In the end there emerged a 'general congressional policy to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts.' Calhoon v. Harvey, 379 U.S. 134, 140." (Bottle Blowers Association, supra, at 470-471.)

The Court then proceeded to focus in on abuses by incumbents as the basis for requiring an election supervised by the Secretary of Labor. The Court explained that this conclusion was reached by Congress:

> "in light of the abuses surfaced by the extensive congressional inquiry showing how incumbents' use of their inherent advantage over potential rank and file challengers established and perpetuated dynastic control of some unions." Bottle Blowers Association, supra, at 474. (Emphasis supplied).

The Court further stated:

> "But Congress, when it settled on the remedy of a supervised election, considered the risk of incumbents' influence to be substantial, not a mere suspicion. . . . consider the incumbents' possible influence on the new election." Bottle Blowers Association, supra, at 475. (Emphasis supplied).

Thus, the holding in the Bottle Blowers Association case was intended to vindicate the rights of "rank and file challengers" such as Captain Scavo, Captain Johnson and Captain Brown and to protect them against the "inherent advantage" of the incumbents against whom they sought and are seeking office and who exert the potential of possible unfair influence upon the new election. Yet the position advocated by the Plaintiff would severely damage the opportunity of "rank and file challengers" to participate in any realistic fashion in a subsequent election since such election could be set aside and rendered meaningless even if the Secretary of Labor wins his lawsuit and the "rank and file challengers" win the election. Such a rule would appear calculated to perpetuate incumbents in office by discouraging anyone from undertaking the massive expense and effort of challenging the incumbent in an election which will be of no consequence if the Secretary of Labor wins his lawsuit but which will be binding upon all parties if the Secretary of Labor loses his lawsuit. It would appear clear that the Congress and the Supreme Court would not impose such an absurd result. On the other hand, a rule requiring the courts to evaluate each subsequent election on its own merits

to determine whether or not the action by the Secretary of Labor should be mooted would wholly accord with the Congressional intent as interpreted by the Supreme Court. The clearest evidence that the subsequent election was not tainted by the illegality of the prior election would be the defeat of the incumbent candidates who were the beneficiaries of the illegality in the prior election. On the other hand, were the incumbents to be successful in the subsequent election, this would not necessarily mean they had derived illegal benefits from the illegality in the prior election. It would not, however, be unreasonable to subject the incumbents to the burden of showing that they had not received such benefits. Such a rule would not be unduly harsh with regard to incumbents since were they to be successful in their lawsuit against the Secretary of Labor, the results of the subsequent election would stand; and on the other hand, were they to be unsuccessful in their lawsuit against the Secretary of Labor, it would mean that they had achieved their office or had been perpetuated in office as a result of an illegal election and therefore it would not be inappropriate to require them to show that the subsequent election was untainted by the illegality of the prior

election. Such a rule would in no way discourage insurgent candidates from challenging incumbents in subsequent elections since the election could not be rendered meaningless were the insurgent either to be successful or to be a participant in an untainted election. It is obvious that the interest of the public would be better served if union democracy were encouraged rather than discouraged by the mechanical approach of an automatic non-mooting rule advocated by the Secretary of Labor. Although the Plaintiff's case is essentially a case of first impression in that there has not been a single prior case in which the subsequent election resulted in a victory or potential victory for "rank and file challengers," nonetheless, the clear impression of the Bottle Blowers Association case, supra, and the clear Congressional intent to protect "rank and file challengers" against the "inherent advantages" of incumbent union officers would seem to leave no reasonable conclusion other than that the question of mooting should be decided on a case-by-case basis and that the present case is one in which the facts are not yet in so as to enable a determination to be made.

Although Captain Scavo, Captain Johnson and Captain Brown have respectfully disagreed with the mechanistic position taken by the Secretary of Labor, they equally

disagree with the position taken by the Union that the 1974 election should be held to moot the action by the Secretary of Labor at this time. The fact is that the 1974 election has not been completed and that desperate, illegal acts by the incumbents are still possible. Until the run-off election is completed and the results are certified, there is no way of knowing that the 1974 election either complies with the requirements of Title 29 USC §481 or that it is untainted by any illegal acts engaged in in connection with the 1971 election. All that we know as of the present moment is that thus far, these circumstances have occurred. Perhaps the credit for the fairness thus far found in the 1974 election belongs to the Plaintiff in this case for having pursued this litigation. The determination of this litigation before the conclusion of the 1974 election might have the effect of inviting abuse. Therefore, it would be most undesirable for the position of the Union to prevail until the run-off election is completed and certified, since to do so might be considered an open invitation to the incumbents to repeat the illegal acts which the Secretary of Labor has found were engaged in by them in connection with the 1971 election.

CONCLUSION

Captain Scavo, Captain Johnson and Captain Brown have shown this Court that the application of a mechanical, automatic rule of non-mooting in connection with subsequent elections held after a challenged election would be inconsistent with the purposes and intentions of Congress in enacting the Labor Management Reporting and Disclosure Act aimed at protecting insurgent candidates, union members and the public at large against abuses of union democracy by incumbent officers intent upon perpetuating themselves in office. It has also been shown that a special rerun election in this case would impose severe damage upon the union to the detriment of its members by weakening the ability of the union to fulfill its responsibilities to its members for a period of some twenty months out of thirty-six. A rerun election should only be compelled in the event that it is essential in order to preserve the integrity of the union and remove a serious cloud hanging over its leadership. It has been shown that no such cloud would be attached to Captain Scavo and Captain Johnson were they successful in the run-off election now in process. It has also been shown that this Court

is not yet in a position to evaluate whether the present case has been mooted by a subsequent election since the subsequent election is still in process and is still subject to potential abuses by the incumbents. The continuation of this action can only serve to discourage such abuses and must therefore be considered as a means of carrying forward the Congressional intention to assure free and democratic union elections. This Court is respectfully urged to deny all motions for summary judgment without prejudice to renewal of such motions after the certification of the run-off election.

Respectfully submitted

JAFFE COHEN BERMAN & CRYSTAL,
Attorneys for Amicus Curae
Parties

Of Counsel:

Ernest Allen Cohen, Esq.,
a Member of the Law Firm

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

Lynn C. Steinseifer, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 217 West Fourteenth Street, New York, New York. On March 19, 1975 deponent served the within Amicus Curae Brief on behalf of Frank T. Scavo, Gerald L. Johnson and Timothy Brown upon:

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At the address designated by each attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Lynn C. Steinseifer

Sworn to before me this
19 day of March, 1975.

ALLEN B. BRESLOW
Notary Public, State of New York
No. 30-5442090
Qualified in Nassau County
Commission Expires March 30, 1976